In the Supreme Court of the United States

OCTOBER TERM, 1899.

BISHOP IRON COMPANY,
DEFENDANT IN ERROR,

vs.

THOMAS W. HYDE,
PLAINTIFF IN ERROR,

No. 126.

In Error to the Supreme Court of the State of Minnesota

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This is an action of ejectment brought by the Bishop Iron Company, defendant in error, against Thomas W. Hyde, plaintiff in error, in the District Court of St. Louis county, Minnesota. The complaint is in the usual form of complaints in such actions. On motion of Hyde, Fred B. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, N. J. Miller, Frank R. Webber, Frank W. Forman and Frank B. Forman were made defendants in the case. The plaintiff in error, Hyde,

answered and therein set up an equitable counter-claim, claiming that by virtue of certain proceedings taken by him before the land department specifically set forth in the answer, he was the equitable owner of the land, and praying that the Bishop Iron Company and his co-defendants be decreed to hold any and all interest which they held in the land in trust for him, and that they be compelled to convey accordingly. The Bishop Iron Company demurred to the counter-claim on the ground that the facts therein stated did not constitute a defense. The defendants Huntress, Brown, Smith, Sharp, Johnson and Miller demurred to the counter-claim on the ground that it did not state facts sufficient to constitute a cause of action, and the defendants Forman also demurred to the counter-claim on the ground that the court had no jurisdiction of the subject of the action, and that it did not state facts sufficient to constitute a cause of action. The defendant Webber demurred to the counter-claim on the ground that it did not state facts sufficient to constitute a cause of action. The trial court sustained each and all of these demurrers. From the order sustaining them Hyde appealed to the State Supreme Court, and the decision of the trial court was affirmed, and the case was remitted for further proceedings according to law. After the record was transmitted from the Supreme Court to the trial Court the Bishop Iron Company withdrew its demurrer and interposed a reply in which it admitted all the facts set forth in the counter-claim to be true. The case was tried to the Court without a jury, and the Bishop Iron Company introduced conveyances of 13-25 of

the land from Warren to whom it was patented, and a lease of 12-25 from the grantees of Warren. No other evidence was introduced. Upon this evidence and the order sustaining the demurrers judgment was entered in favor of the Bishop Iron Company for the possession of the land, and also in favor of the co-defendants, barring Hyde from all right, title and interest in the land. From these judgments Hyde appealed to the State Supreme Court, and they were there affirmed. Hyde sued out a writ of error to this court, and the question which arises here, and the sole question, is whether or not the facts set forth in Hyde's counter-claim are sufficient to show that he is the equitable owner of the land.

ASSIGNMENTS OF ERROR.

The plaintiff in error filed nineteen assignments of error, the first nine of which for the sake of brevity may be summarized as follows:

I.

1. The court erred in deciding that the plaintiff in error, Thomas W. Hyde, was not the equitable owner of the lands in question; and that the following findings, orders and judgments based upon such decision were therefore erroneous:

2. The finding that the Bishop Iron Company is the owner in fee of part of said lands.

3. The finding that said Iron Company is the lessee of any other part thereof.

4. The finding that Hyde is in the wrongful possession of the lands.

5. The order sustaining the demurrers to the amended answer and counter-claim of Hyde.

6. The entering of judgments on such demurrers and on the reply of the Bishop Iron Company.

7. Denying the motion of Hyde to set aside such findings and orders and for a new trial.

II.

The plaintiff in error also makes the following additional assignments of error:

1. It was error for the Court to hold that the Secretary of the Interior had a right to consider the testimony in reference to the contract of Hyde and McDonald with their attorney taken in the case of McDonald vs. Eaton, et al, for the reason that the Secretary in considering the same acted in violation and in disregard of law and the usual and regular rules of practice of the department, and there was no such issue in said case.

2. It was error for the Court not to consider the fact that the Secretary of the Interior made a mistake in reference to the testimony of the said Hyde given in the case of McDonald vs. Eaton et al.

3. It was error for the Court to hold that the Secretary of the Interior could properly find that an illegal contract had been made in reference to said lands for the reason that said testimony properly read did not and does not show that he, said Hyde, ever made an illegal contract in reference thereto.

4. It was error for the Court to hold that the Secretary of the Interior could consider and properly did consider the testimony in reference to said con-

tract taken upon the hearing of the said case of McDonald vs. Eaton, et al, in considering the said case of Hyde vs. Eaton et al for the reason that said testimony was not received in the Hyde case; the only testimony in the McDonald case which was stipulated into the Hyde case was that bearing upon the legality of the location of the Sioux Half Breed scrip No. 19 D. which was the only issue in said case.

5. It was error for the court to hold that the commissioner of the general land office properly dismissed the said Hyde contest against the said Warren scrip selection or location, for the reason that said commissioner had no power or authority to dismiss the contest without notice to the said Hyde, and the decision of the secretary, upon which he based his action, was erroneous, unlawful and unwarranted, and made in another case in which the question was not in issue, and to which the said Hyde was not a party on incompetent, irrelevant and mistaken testimony.

6. It was error for the court to hold that the "McDonald contest was ordered upon charges made to the commissioner by both McDonald and the defendant" (the said Hyde) because such is not the fact as alleged in the answer of the said Hyde.

7. It was error for the court to hold that in the said McDonald contest, and the contest of the said Hyde against the said scrip locations, they voluntarily litigated the question as to their respective preemption rights for the reason that said holding is contrary to the fact as alleged in said answer.

8. It was error for the court to hold that when the decision of the secretary was made in the con-

tests against the Sioux Half Breed Scrip locations the rights of the said McDonald and of the said Hyde as pre-emptors were before him, for the reason that it is alleged in the said answer of said Hyde, that said McDonald at said time had exhausted his pre-emption right, and the application of the said Hyde to file his declaratory statement on lots five and six and the SE¼ of the NW¼ of the said section 30 was not before him, and for the further reason that said secretary did not decide that the rights of the said McDonald and of the said Hyde as pre-emptors were before him, but that he by virtue of his supervisory power could on incompetent, irrelevant and immaterial testimony taken in another case pass upon their pre-emption rights, which ruling was erroneous and unlawful.

9. It was error for the court to hold that the respective contests of the said McDonald and of the said Hyde "Were initiated and prosecuted by the said McDonald and the defendant (the said Hyde) jointly," for the reason that it is alleged in the answer that they were initiated and prosecuted separately.

10. It was error for the court to hold that the said testimony in reference to the said contract was in both cases—the respective contests of the said McDonald and of the said Hyde against the Sioux Half Breed Scrip locations without objection or reservation.

ARGUMENT.

I.

It will be unnecessary to argue the different assignments of error separately. The controlling

question in the case is whether or not the facts set forth in the answer by Hyde by way of counterclaim constitute a cause of action. We admit the patenting of the land to James H. Warren and the conveyance of 13-25 thereof to the Bishop Iron Company and of 12-25 made to grantees who leased the same to it, so that unless Hyde by virtue of the proceedings taken by him before the Land Department as set forth in his answer is the equitable owner of the land and entitled to compel a conveyance thereof from those holding the legal title the plaintiff in the trial court should have recovered.

The facts constituting the counter-claim of the plaintiff in error and showing the proceedings taken by him before the Land Department as set forth in the amended answer are as f llows: that the Bishop Iron Company is a corporation; that the defendant Hyde has been in the actual, open and exclusive possession of the land in controversy claiming to own the same ever since August 20th, 1884. (Record page 13)

That the defendant in error and other parties made defendants claim some interest in the land adverse to Hyde, but said claims are without legal right or authority. (Record page 13)

That on August 20th, 1884, the land was unsurveyed government land, subject to pre-emption. The plat of survey of said lands was filed in the local land office July 20th, 1885 (record page 14).

When Hyde went into possession of the land he was a qualified pre-emptor settled upon the same with the bona fide intention of acquiring title thereto

under the pre-emption laws; that he built a house, made improvements and has ever since lived upon and cultivated the land (record page 14).

On July 20th, 1885, Hyde, *in good faith*, and for the purpose of acquiring title to the land in controversy duly made application to file his pre-emption, declarators statement for said lands (N. E. ¼ of S. W. ¼ of Section 30, and Lots 5 and 6 and S. E. ¼ of N. W. ¼ of said Section 30) and tendered the land officers the fees therefor.

That the local land officers received said application and informed Hyde that they would reject the same unless limited to said N. E. ¼ of S. W. ¼ of said Section 30. Hyde then informed the officers that his house and the land he had cultivated was upon said N. E. ¼ of S. W. ¼, and that he desired and intended to claim the same as a pre-emption, whether or not he was successful in his contest which was then pending against a S. H. B. scrip location upon lots 5 and 6 and S. E. ¼ of N. E. ¼ of said Section 30. The local land officers retained his application and informed him that if he was a settler in good faith that by what he had done his rights were as fully protected as they could be under the rules. That on that day, but at what time Hyde is unable to state, the Register of said land office endorsed upon his application the following:

"Land Office, Duluth, Minn., July 20th, 1885. The within application to file D. S. on the within described land is refused as to the SE¼ of the NW¼ and lots 5 and 6 of Sec. 30, T. 63, R. 11 W. for the reason that the date of settlement alleged herein

does not ante-date the unadjusted location of Sioux half breed scrip No 19 E, in the name of Orile Moreau, filed for location June 16, 1883. Said unadjusted scrip location having withdrawn said land from settlement under the pre-emption law subsequent to said date of filing of said scrip, towit: June 16, 1883, you are allowed thirty days for appeal, and are advised that if you fail to do so within that time, this decision will be final." (Record, page 15.)

That the land officers retained said application and on the 20th day of August, 1885, endorsed thereon "Filed Aug. 20, 1885." Hyde did not know of said endorsements and relied upon what the land officers told him, and supposing his application to have been rejected as to all the lands, appealed from the decision of such officers. (Record, page 15.)

That on October 15th, 1885, one Sharp, pretending to act for James H. Warren, an alleged mixed blood of the Chippewas, to whom a certificate of identity unlawfully and without authority was issued by the Commissioner of Indian Affairs under the 7th Section of the 2nd Article of the treaty between the United States and the Chippewa Indians, selected said NE¼ of SW¼ of said section 30; that Hyde had no notice of such selection until April 10th, 1886. (Record, page 15.)

That Warren's selection was not made by his attorney in fact, but was made for the benefit of other parties, and they all had notice of Hyde's rights and made the selection with the intention of defeating such rights. (Record, page 16,)

That on April 10th, 1886, Hyde contested the

said Warren selection, and in said application stated that he desired and intended to claim and demand his pre-emption right to the said NE¼ of the SW¼, section 30, whether successful in his contest against the Sioux half-breed location or not, and on December 22nd, 1888, a hearing was ordered by the honorable commissioner of the general land office to determine which had the superior right to said land, Warren or Hyde. (Record, page 16.)

That on June 16th, 1883, S. H. B. scrip Nos. 19 D and 19 E were located by one Eaton in the name of one Stram, No. 19 D, upon lots 3, 5 and 6, and SE¼ of NW¼ of section 30, and 19 E upon lots 1 and 2 and SW¼ of NE¼, and NW¼ of SE¼, section 30. (Record, page 16.)

That on October 9th, 1884, Hyde contested said scrip location 19 D on the ground that the same was *illegally* located. (Record, page 16.) That on October 5th, 1884, one McDonald contested scrip location No. 19 E on the same grounds. (Record, page 17.)

That on the 14th day of November, 1885, the commissioner of the general land office ordered a hearing to determine the legality of both of said scrip locations (record page 17).

That the order of hearing was transmitted to the local land office and notice of hearing in each of said cases was issued. (Record page 17, Exhibits B and C, record pages 26 and 27).

That pursuant to said notice the contest of McDonald came on for hearing April 6th, 1886, and testimony was submitted, that on said hearing irrelevant, incompetent and immaterial testimony in re-

lation to a contract between Hyde and McDonald and S. F. White, their attorney, as set forth in pages 18 and 19 of the record was erroneously admitted.

That at the conclusion of the taking of the testimony in the McDonald case a stipulation was made that the testimony in that case should be considered in determining the legality of both scrip locations Nos. 19 D and E (record page 20).

That no testimony was admitted or received in the Hyde case other than that which went in under said stipulation, and that was admitted for the purpose *and that only of determining the validity of scrip location No. 19 D.* The validity of said scrip locations was the only issue in either of said contests. The local land officer held both of said scrip locations valid (record page 20).

That Hyde and the said McDonald appealed from said decision separately and assigned as error, 1st: because the Register and Receiver was never authorized or directed to decide said case. 2nd: because the so-called decision is contrary to the evidence and the facts. 3d: because the so-called decision is contrary to law. 4th: because the so-called decision treats the case as though the contest was one between the scripee and her attorney, whereas it grew out of a contest by third parties who claim and have shown that the scrip entry was fraudulent on the part of both the scripee and her grantees. 5th: That the local land officers in their so-called decision failed to pass upon the vital question in the case, namely, whether or not the land

contained improvements made by or under the personal supervision or direction of the scripee and were for her personal use and benefit. (Record page 20).

The said appeals came on for hearing before the assistant commissioner of the general land office, and he, on August 4th, 1888, cancelled both of said scrip locations on the ground that "The evidence showed conclusively that the scripee never saw the land or the improvements or had anything whatever to do with either." (record page 20)

That Eaton, attorney for Stram, appealed from said decision to the Secretary of the Interior, William F. Vilas, and he on February 18th, 1889, affirmed the decision of the commissioner cancelling the scrip locations, but erroneously and contrary to law declared said land open to entry by the first legal applicant (record pages 20 and 21).

That the appeal of said Hyde from the rejection of his application to file as a pre-emptor so far as related to said lots 5 and 6 and the S. E. ¼ of the N. W. ¼ of said Section 30 was not before the Secretary. That at that time the said McDonald had exhausted his pre-emption right which fact was before said decision brought to the attention of said Secretary, William F. Vilas. That prior to said decision no charge was ever made or filed against the right of either the said Hyde or McDonald in either of said cases to file on said lands or any lands as pre-emptors, and on the question of said Hyde's good faith in making said applications to file on said lands he never had a hearing or his day in court. That notwithstanding the fact that McDonald had ex-

hausted his pre-emption right and that said appeal of said Hyde from the rejection of his application to file on said land as a a pre-emptor was not in issue in either of said cases or before the Secretary, and that Hyde had never had a hearing on his right to file on said land as a pre-emptor, it was determined erroneously and contrary to law by said Secretary and that a hearing had been had, on their rights as pre-emptors and that he by virtue of his supervisory power had the right to pass upon them, and by making a mistake as to the testimony of said Hyde decided that the testimony showed it was impossible for either of them to make the affidavit required by Section 2262 R. S. U. S., "That he had not directly or indirectly made any agreement or contract in any way or manner with any person whatsoever by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself, and that his application to file should be treated as though it had been filed and that it ought to be cancelled if filed." That Hyde's testimony as it in fact was is as follows: "It (the contract) contained that when I proved up on the land I was to secure him *on* a one-half interest"; that it was mistaken and misquoted so as to read "It contained that when I proved up I was to secure him a one-half interest." (Record page 21.)

That thereafter said Hyde duly made a motion to review said decision on the grounds of said mistake, and that his rights as a pre-emptor were not in issue in said contest, and that it was error for said Secretary to hold that said lands were open to entry by the first legal applicant. That thereafter the same came

on for hearing, and on the 28th day of January, 1891, the Secretary of the Interior (John W. Noble) modified said decision of Secretary Vilas by holding and deciding that the preference right of entry of neither the said Hyde nor McDonald was decided thereby, but erroneously and contrary to law denied said motion in all other respects. (Record page 22)

That on the 8th day of March, 1889, the commissioner of the general land office without notice to the said Hyde and without authority of law, based on Secretary Vilas' decision, revoked the order of December 22nd, 1888, and dismissed the contest of the said Hyde against the said Warren selection. (Record page 22.)

On learning of this action said Hyde made a motion to set aside said last order, which motion has never been passed upon, and that the commissioner unlawfully and wrongfully neglected to pass upon the same.

That on the 19th day of March, 1889, one Hartman filed an application to contest the entry of the said Warren which was refused, and he appealed to the Commissioner of the General Land Office. That on the 23rd day of February, 1889, various other parties made application to contest the said Warren selection and enter said lands, which were rejected, and appeals taken therefrom to the Commissioner of the General Land Office. That on the 16th day of October, 1889, the Commissioner erroneously and contrary to law held that said location by said Warren was valid, and that the said affidavit of contest of the said Hartman did not present sufficient grounds for a

contest and erroneously and contrary to law failed, refused and neglected to pass upon said motion of the plaintiff in error to reinstate his said contest against the Warren scrip location. That from the decision of the Commissioner of the General Land Office all parties including plaintiff in error and excepting the said Warren appealed to the Secretary of the Interior and by stipulation of counsel of all parties interested the said appeals came on for hearing before the Secretary of the Interior on the 19th day of October, 1891, (record page 22) and he on the 31st day of May, 1892, erroneously and contrary to law based upon the decision of Secretary Vilas of February 18th, 1889, decided "That the defendant (plaintiff in error) could claim nothing by virtue of his preemption claim to said N. E. ¼ of the S. W. ¼ of Section 30" and directed the Commissioner to order a hearing upon Hartman's contest. That the plaintiff in error filed a motion for review of said decision on the grounds set forth on page 22 of the record, and on the 12th day of November, 1892, the Secretary, based on the decision of Secretary Vilas, erroneously and contrary to law denied said motion. That the Commissioner ordered a hearing on the contest of said Hartman, and notice thereof was given, and the same came on for hearing before the local land officers on the 17th day of January, 1893, at which time and place the plaintiff in error duly appeared and applied to be made a party thereto and be heard and offered evidence in support of his settlement, residence and improvements upon said lands, which application and offers were erroneously and contrary to law rejected

and denied by the local land officers. That the plaintiff in error appealed to the Commissioner of the General Land Office and he on the 21st day of August, 1893, erroneously and contrary to law based upon the decision of Secretary Vilas decided that the plaintiff in error had no standing in the case (record page 23).

That plaintiff in error appealed to the Secretary of the Interior and he on the 20th day of July, 1894, erroneously and contrary to law based upon the decision of Secretary Vilas affirmed the decision of the Commissioner and directed the entry of said Warren be held for patenting.

That on December 22nd, 1894, patent to said lands erroneously and contrary to law issued to James H. Warren. (Record page 22).

That Hyde by his residence and improvements acquired a right to be preferred in the acquisition of said lands from the United States, and under the law properly administered patent would have issued to him. (Record page 24.)

It will thus be seen that the commissioner of the general land office, without notice to Hyde, dismissed his contest regularly and orderly initiated pending before the local land office contrary to the rules, regulations and procedure of the Department and deprived him of his pre-emption right to the land in controversy. This action on the part of the commissioner was ex parte, and being without notice is not binding on the court. In United States vs. Steenerson 50 Fed. Rep. 510 it is said after defining the powers of the commissioner to supervise the action of the local land officers "But it is equally true

that such action of the commissioner, being practically ex parte, is not conclusive." In Orchard vs. Alexander, 157 U. S. 372, the Court says: "Of course this power of reviewing and setting aside the action of the local land officers is, as was decided in Cornelius vs. Kessel, 128 U. S. 456, not arbitrary and unlimited. It does not prevent judicial inquiry. Johnson vs. Towsley, 13 Wall. 72." This is the universal doctrine as laid down by the courts and by the Land Department.

Puget Mill Co. vs. Brown, 54 Fed., 991.
Brogan vs. Mtg. Co., 63 Fed., 192.
Risdon vs. Davenport, 57 N. W. R., 482.
Lewis vs. Shaw, 70 Fed. Rep., 293.
Winsor vs. McVay, 93 U. S., 272.
Stinson vs, Clark, 45 Fed. Rep., 760.
Perry vs. O'Hannon, 11 Mo., 373.
M. K. T. R. R. Co., vs. LaSalle, 14 L. D., 217.
Whitt vs. McGuirk, 6 L. D., 268.
Henyon vs. Green, 5 L. D., 684.
Abess vs. VanZee, 4 L. D., 488.
Hanson vs. Howe, 2 L. D., 222.
Winans vs. Miller, 4 L. D., 254.
Young vs. Hanson, 64 N. W. R., 654.
Parsons vs. Venzke, 61 N. W. R., 1036; 164 U. S., 89.
Pfund vs. Valley Loan & Trust Co., 72 N. W. R., 480.

In Hanson vs. Howe, 2 L. D., 221, it is said: "To permit the dismissal of a contest regularly initiated on motion of a stranger to the record without notice to the contestant and prior to the day of hear-

ing would be to adopt a rule contrary to all procedure in courts of law that would lead to great confusion in practice by this department, and effectively deprive the original contestant of his day in court." It appears from the facts alleged in the answer that the defendant has done everything he could do in the prosecution of his rights, and therefore is entitled to the same consideration he would be had everything been done which he attempted to do and which he was unlawfully prevented from doing.

As was said by Mr. Justice McLean in Lytle vs. Arkansas, 9 Howard, 374, "It is a well established principle, that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him." And again, "The claim of pre-emption is not that shadowy right which by some it is considered to be. Until sanctioned by law it has no existence as a substantive right. But when covered by the law it becomes a legal right, subject to be defeated only by a failure to perform the conditions annexed to it."

Hyde had initiated a pre-emption right to the land by his settlement and application to file thereon and tender of the land office fees, and the actual filing of his declaratory statement so far as this land is concerned—the filing of his application and the endorsement thereon show that his declaratory statement as to this forty was accepted and his filing allowed. He thereby acquired "A right to be preferred in the purchase or other acquisition of the land."

Ard vs. Brandon, 156 U. S., 536.
Shipley vs. Cowan, 91 U. S., 330.
Roy vs. D. & I. R. R. Co., 173 U. S., 587.

This was a segregation of the land from the public domain, Lindville vs. Clearwater, 11 L. D., 356; Henry Miller, 14 L. D,, 242, and the recognition of his rights as a pre-emptor, Whitney vs. Taylor, 158 U. S., 85, and Warren should not have been allowed to select the land; but the local land officers allowed him to do so. Hyde then set up his claim to the land based on what he had done, and a hearing was ordered to determine which had the better right, he or Warren. In this case his rights as a pre-emptor were directly involved, and no reason is perceived why they were not regularly and in the ordinary course of procedure determined therein. Instead of allowing the case to proceed to trial the Commissioner arbitrarily and without notice revoked the order of hearing because of the decision of Secretary Vilas. If the decision is erroneous, this action on the part of the Commissioner was unwarranted, and all decisions made by the department based thereon are erroneous. Let us examine this decision and ascertain whether or not the Secretary in that case had power or authority to pass upon the pre-emption rights of the contestants, and if he had, was the conclusion reached by him warranted by the case before him?

All decisions heretofore made by the courts and Land Department and the dismissal of Hyde's contest by the Commissioner, were based on the decision of Secretary Vilas dated February 18th, 1889. If

this decision is erroneous, then all the decisions based thereon are such. We contend that the Secretary had no power to pass upon the pre-emption right of either Hyde or McDonald in their contests against Sioux half breed scrip locations. In the contests their rights as pre-emptors were not in issue.

"Express provision is made by the rules of practice for a contest before the land office and a regular formal trial," of which rules the Court will take judicial notice.

Caha vs. U. S. 152 U. S., 219; 38 L. Ed., 415.

The affidavit of contest determines the issues. The charges therein contained are the only ones the contestee is required to answer, and the testimony should be confined to such charges.

Schelter vs. Off, I. L. D. 113.
Shull vs. McCormick, I. L. D. 470.

Hyde attacked the *legality* of scrip location No. 19 D and McDonald of No. 19 E on the ground "That the scripee never made any improvements on the land either in person or by her agent or attorney," and that the scripee had not given Eaton a power of attorney or any authority to locate land with the scrip or to make any improvements or to erect buildings. (Record pages 16 and 17.)

In refutation of these charges Eaton filed in the local land office affidavits in support of the legality of the scrip locations, and copies of two powers of attorney purporting to have been executed by the scripee and her husband. (Record page 17.)

Here were the issues. It is true that as Secret-

ary Vilas says in his decision the affidavits of contest each set forth the qualification of the contestant to enter the land as pre-emptors, and that they had settled on the respective tracts of land and intended to file declaratory statements therefor, when the plat of survey should be filed. But this was nothing more than a compliance with the rule of the Commissioner of the general land office made May 28th, 1883, requiring contestants to set forth in the affidavit of contest their qualifications to enter the land. Certain it is that the statements in the affidavits of contest as to the qualifications of the contestant to enter the land that he had settled on the same after the location of the scrip, and that he intended to file a declaratory statement for the land when surveyed—would not be grounds for a contest under any circumstances. These facts would not and could not in any view of the case affect the validity of the scrip locations. They were not enough upon which to predicate any kind of a claim. It was not necessary to state in the affidavit of contest that the contestant intended to enter the land or that he was qualified to do so. The rule of the Commissioner in this respect had been changed. Lyman vs. Fayant, 4 L. D. 203; Charles Hotaling, 3 L. D. 17; Geisendorf vs. Jones, 4 L. D. 185; Lerne vs. Martin, 5 L. D. 259; Wazsizer vs. Kropitzky, 5 L. D. 296; Heartley vs. Ruberson, 11 L. D. 575; McGee vs. Ortley, 14 L. D. 523; Henyan vs. Green, 5 L. D. 684. True, when the land was surveyed Hyde applied to enter three forties covered by S. H. B. scrip with the forty in issue as a pre-emption, but this was an independent proceeding.

the decision of Secretary Smith of December 21, 1894 (19 L. D., p. 547), Appendix No. 4. From this decision it appears that under the operation of Secretary Vilas' decision the Sioux Half-Breed location was canceled; that notice of this action was received at the local land office and the land opened to filing February 23, 1889; that thereupon various parties filed conflicting applications to appropriate the land; that this conflict resulted in a hearing being ordered between the various claimants; that at this hearing an enormous mass of testimony was taken, the record being described by the Secretary as one of the most voluminous ever transmitted to the Department, and that the ultimate result of this proceeding was the Secretary's decision of December 21, 1894, now immediately under consideration.

The decision of Secretary Noble, dated November 12, 1892, referred to above, expressly held that, while the *pre-emption* claim of Hyde was *res adjudicata*, his claim to be recognized as a preferred claimant under the act of 1880 was not disposed of because not properly in order until he had made an application under that act. Under this reservation in Secretary Noble's decision of November 12, 1892, Hyde formally became a party to this new proceeding. He was recognized as such by the order for a hearing; he became formally a party by filing, April 2, 1891, a homestead application; he appeared at the trial and produced a large amount of testimony, relating to his settlement, residence, and cultivation, and he appealed from the adverse decision of the Register and Receiver. The Commissioner, considering this appeal, found, as matter of fact, that "voluminous testimony" was introduced on the question of the existence of the prohibited contract and that upon this additional testimony it was clearly and conclusively established that such a contract

was in existence, even if such fact did not appear in the original case pending before Secretary Vilas. This finding of the Commissioner was in the following words (Appendix No. 3):

"But even if this were otherwise, and the pre-emption claims were now the proper subject of consideration, I am entirely satisfied upon the evidence that the grounds upon which the two decisions referred to proceeded were well-founded in point of fact. Without attempting at length to discuss the voluminous testimony upon this particular point, I deem it sufficient to say that a careful consideration thereof satisfies me of the existence of an illegal and prohibited contract in respect to the lands claimed by these parties under the pre-emption law. The testimony in the case at bar clearly and conclusively establishes that fact, even if it did not satisfactorily appear in the proceeding resulting in the two decisions mentioned. I find from the testimony in the case at bar that the pre-emption claims of these parties were not initiated in good faith but were established under a written contract by the terms of which the title procured from the United States would enure, in part at least, to others than the claimants, and that for this reason, as found and determined by Secretaries Vilas and Noble, the claims are invalid and must upon their merits be rejected.

"I accordingly find and hold that the claims of these parties here presented are invalid and must be denied."

In deciding Hyde's appeal from this decision, Secretary Smith, in his decision of December 21, 1894, referring to Hyde's pre-emption claim, said (19 L. D., pp. 550, 551):

"The hearing was set for June 8, 1891. Prior to that date, however, viz., on April 2, 1891, Hyde made homestead application for lots 5 and 6, the S.E ¼ N.W. ¼ and N.E. ¼ S.W. ¼ of said section, claiming the same by virtue of his alleged preference right of entry, and by virtue of his settlement made on the last-named tract August 20,

1884, and his subsequent residence thereon. On the next day (April 3) McDonald made homestead application for the N.W. ¼ S.E. ¼ of said Sec. 30, claiming the same on the same grounds asserted by Hyde, viz: preference right of entry and settlement, residence and improvement.

"On the day of the hearing (June 8, 1891), Hyde filed a petition to amend his homestead application of April 2, 1891, by omitting therefrom the N.E. ¼ S.W. ¼ of said Sec. 30, asserting, however, that he did not intend thereby to abandon his claim to that tract, but he would at the proper time assert his claim thereto. His petition was allowed and the application amended as requested." * * *

"An appeal by the parties adversely affected by said decision brings the case to this Department. Taking them in the order presented at the trial and in the arguments and briefs of counsel, the first requiring consideration are the claims of Hyde and McDonald.

"At page 23 of their brief they declare that 'they do not claim the land in controversy by virtue of any settlement or pre-emption rights,' and at the bottom of page 24 of said brief they assert that 'the question of these pre-emption rights is not in the case.' Notwithstanding these statements, however, there is in the record (1) their homestead applications, containing, as stated, an express claim to these lands by virtue of settlement thereon August 20, 1884, and subsequent residence and improvement; (2) a great amount of testimony with reference to said settlement, residence, and improvement, said settlement, etc., being the same on which they based their pre-emption right to said lands.

"If there ever was a question to which the doctrine of *res judicata* applied it is that of the settlement and pre-emption rights of McDonald and Hyde to the lands embraced in Orille Stram controversy, a part of which is included in their homestead application of April 2 and 3, 1891.

"There must of necessity be somewhere an end to controversy. Their settlement and pre-emption rights to these lands involved in the controversy concerning the Sioux half-breed scrip locations of Orille Stram were fully con-

sidered, and finally determined by the Department adversely to them in its decision February 18, 1889, *supra*, and in its review of that decision January 28, 1891 (12 L. D. 157), and the introduction into the record of this case of the evidence referred to cannot resurrect and revitalize that dead issue."

And, with reference to the claimed right of preference under the act of 1880, the Secretary said:

"In your office letter 'H' of March 13, 1891, directing a hearing, it was stated, with reference to Hyde and McDonald, that—

> 'should they set up any claim as preferred contestants in regard to lots 5 and 6 and S.E. ¼ of N.W. ¼ and N.W. ¼ of S.E. ¼ of said Section 30, you will allow them full opportunity at the hearing directed herein to present their testimony and be heard with others.'

"This clearly limited the inquiry, so far as they were concerned, to their 'claim as preferred contestants' as to their alleged preferred right to enter the land described in said office letter 'H.' The local office so treated it, and in its decision denied them a preference right to enter said lands, holding, as stated, that they are not contestants under the act of May 14, 1880. Your office, on appeal, affirmed the decision of the local office in that respect, and their appeal here from your office decision brings before me for consideration, so far as they are concerned, that single question and none other.

"To entitle them to a preference right of entry it must appear that their action against the Stram scrip locations was a contest under the act of May 14, 1880.

"The proceedings against the Stram scrip locations were separately instituted by Hyde and McDonald on October 9, 1884. At that time the lands were unsurveyed. The papers or pleadings by which the proceedings were begun are, with the exception of names and description, identical. After averring the invalidity of the scrip locations, each pleader proceeds in the exact language of the law to state his qualifications as a pre-emptor. He then states the date

of his settlement on said land, that it was made with a view of inhabiting and cultivating it for his own exclusive use and benefit, and that as soon as the township plat was filed in the local office, at Duluth, he intended to file his pre-emption declaratory statement for said land.

"It will at once be seen that those pleadings asserted the superiority of the pre-emptor's title over that of the scrip locator, that it brought the two titles squarely in conflict, necessitating a judgment as to which was the better. And that the litigation following was a contest between conflicting claims. There is no intimation in the pleadings themselves that the proceedings are instituted under the act of May 14, 1880, and they certainly bear no resemblance whatever to the familiar affidavits of contest under that act. It is shown by the evidence in this case that on the trial of that case before the local office, a question as to who should pay the Land Office fees arose, and that the suggestion was made that McDonald and Hyde, as the contestants, should pay the fees. Thereupon their attorney declared that the proceedings were not contests under the act of May 14, 1880, but contests between conflicting claims, and hence not within the rule requiring the contestant to pay all of the Land Office fees, but that the fees should be apportioned between the parties, each paying their own fees, and that the matter was adjusted in that way.

"Again, it is apparent that if those proceedings were instituted by Hyde and McDonald for the purpose of securing a preference right of entry to the lands covered by the scrip locations, they would have exercised that right within thirty days from the date of notice of the decision of February 18, 1889. But, instead of that, they each filed a motion to review and reverse that opinion, and thereby assumed a position utterly inconsistent on the part of intelligent persons, seeking a preference right to enter the lands involved in that controversy. Their every act has been that of persons consistently endeavoring to assert and establish their title under the pre emption laws, and, incidentally, to clear from the record the Orille Stram scrip locations, which were, in effect, a cloud on their pre-emption title.

"The claim of a preference right to enter these lands as

successful contestants evidently was an afterthought that came to them when casting about for some means by which to extricate themselves from the wreck in which the decision of February 18, 1889, involved them.

"There is no theory presented by this case, in any of its manifold aspects, by or under which the status of Hyde and McDonald, in the controversy with Orille Stram *et al.*, could be construed to be that of contestants under the act of May 14, 1880. And the decision of your office, rejecting their applications to enter the lands embraced in their respective homestead applications and denying them a preference right to enter the same, as alleged successful contestants, is in that respect hereby affirmed."

April 12, 1895, this decision of Secretary Smith, absolutely disposing of both claims of Hyde, was affirmed upon motion for review. (20 L. D., 324.)

It is thus seen that the entire claim of Hyde, both as a pre-emptor and as a preferred claimant, has been fully and exhaustively considered by the Land Department in proceedings to which he was a party and upon evidence and affidavits which he himself submitted.

As to his pre-emption claim, two of these decisions, by two different Secretaries, reject the same and declare it illegal upon testimony formally submitted at a hearing before the Register and Receiver; and to this is to be added a third decision, by the Commissioner of the General Land Office, to the same effect, upon other and additional testimony taken at another hearing, in a different case. And to all this must be superadded five other decisions of the Secretary of the Interior, declaring all questions as to Hyde's right under the pre emption law *res adjudicata* under the first two decisions mentioned.

As to his claim of preference right under the act of 1880, two decisions have found it to be entirely without validity and untenable and have rejected the same.

These various adjudications by the Interior Department were all decisions in matters of fact as contradistinguished from conclusions of law. They involved the exercise of the judgment conferred by law upon the Secretary of the Interior in the necessary determination of facts antecedent to the issue of a patent for the land.

As to the pre-emption claim, the question presented and decided was whether Hyde had entered into a certain contract under which his title, if perfected, would inure in part to others than himself. That was a question of fact. The determination of the question depended upon testimony. If he had actually executed a paper of that particular character, he was within the prohibition of the statute. Whether or not he had executed such a paper depended upon testimony. In determining this question, upon evidence, the Secretary necessarily determined a question of fact and not of law. At the very best, however, for the plaintiff in error, the question was one of mixed law and fact. The mental process by which the question was solved might have been one of two kinds. The Secretary may have first looked to the provisions of the statute, observed what was there obviously and plainly prohibited, and then looked to the evidence to determine whether a paper of that particular kind had been executed by Hyde. Or, the Secretary may have first ascertained the facts surrounding the transaction, whether Hyde had executed a paper and what were its terms, and then looked to the statute to discover whether such a paper was prohibited by the law. We submit that by either of these processes the ultimate determination was one of fact; but, in any event, it was a question of mixed law and fact in which the line between the determination of law and that of fact is imperceptible except to the judicial mind operating upon the subject. For ex-

ample:—The general laws of the United States do not permit the appropriation of land by a foreigner. The claimant must be a citizen or have declared his intention to become such. The Secretary must determine from an inspection of the naturalization certificate whether it is in proper form and sufficient to authenticate the fact. This is in the nature of a conclusion of law, yet it would obviously be a determination of fact within the numerous decisions of this court refusing to disturb a decision of the Secretary defining the qualifications of a settler.

As to preference right under act of 1880, the question was absolutely and entirely one of fact. Such a claim preferred by Hyde to be valid necessarily depended upon the ascertainment of many pre-existing circumstances. These facts were all found against Hyde by the Secretary in his decision. He found that the steps necessary to put a contestant in position to assert such a claim had not been taken; that Hyde, from the evidence before him, as a matter of fact, never intended to have his contest so treated, and, finally, that as matter of fact, Hyde had not paid the fees of the Register and Receiver, required by the act as a prerequisite to the assertion of such a claim.

Under these circumstances the aggregated decisions of the Department against the validity of any claim on the part of Hyde in and to the premises are clearly conclusive. This court has over and over again decided this proposition in many similar cases, and were it not for the unequivocal position taken by adverse counsel in the case, to the effect that to remedy an injustice this court will review findings of fact made by the Land Department, we would consider a reference to the cases not only unnecessary, but perhaps unpardonable.

With this claim on the part of our adversaries for an apology, we invite attention to the more recent adjudications of this court upon the subject.

Wherever a special tribunal of any character has been endowed with jurisdiction to hear and determine certain facts as preliminary to a conveyance of land or the investiture of title, the determination of those facts by said tribunal in the absence of fraud is final and conclusive upon the courts.

United States *v.* Arredondo, 6 Pets. 691.
Wright *v.* Roseberry, 121 U. S. 488, 500, 501.
Craigin *v.* Powell, 128 U. S. 691, 698, 699.
United States *v.* Cal., etc., Land Co., 148 U. S. 31, 43, 44.
Barden *v.* N. P. R.R. Co., 154 U. S. 288, 327, 330, 331.
McCormick *v.* Hayes, 159 U. S. 332.

In United States *v.* Cal. &c. Co. (*supra*), this general doctrine is thus announced by Mr. Justice Brewer (p. 43):

"Now, it is familiar law that when jurisdiction is delegated to any officer or tribunal, his or its determination is conclusive. Thus in the case of United States *v.* Arredondo, 6 Pet. 691, 729, this court said: 'It is a universal principle that, where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done, and the public, or any person denying its validity, are, power in the officer, and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer; whether executive (1

Cranch, 170, 171), legislative (4 Wheat. 423; 2 Pet. 412; 4 Pet. 563); judicial, (11 Mass. 227; 11 S. & R. 429; adopted in 2 Pet. 167, 168), or special (20 Johns, 739, 740; 2 Dow P. C. 521, etc.), unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal, is prescribed by law.'"

And that the decision of the Land Department made upon a question of fact in a contested case within its jurisdiction is conclusive upon the judiciary, has been settled by repeated decisions of this court.

Johnson *v.* Towsley, 13 Wall., 72, 83, 84, 86, 87.
Warren *v.* Van Brunt, 19 Wall., 646, 652, 653.
Shepley *v.* Cowan, 91 U. S., 330, 339, 340.
Moore *v.* Robbins, 96 U. S., 530, 533, 535.
Marques *v.* Frisbie, 101 U. S., 473, 475, 476.
Vance *v.* Burbank, 101 U. S., 514, 519.
Smelting Co. *v.* Kemp, 104 U. S., 636, 647.
Quinby *v.* Conlan, 104 U. S., 420, 425, 426.
Steel *v.* Smelting Co., 106 U. S., 447, 450, 451.
Baldwin *v.* Stark, 107 U. S., 463.
U. S. *v.* Minor, 114 U. S., 233, 243.
Lee *v.* Johnson, 116 U. S., 48.
Heath *v.* Wallace, 138 U. S., 573, 580, 585.
Sanford *v.* Sanford, 139 U. S., 642, 647.
Knight *v.* Land Association, 142 U. S., 161, 177, 178.
Carr *v.* Fife, 156 U. S., 494, 498, 500, 501.
Catholic Bishop, etc., *v.* Gibbon, 158 U. S., 155, 166.
Burfenning *v.* C. St. P. M. & O. R.R., 163 U. S., 321, 323.
Gonzales *v.* French, 164 U. S., 338, 342.
Beley *v.* Napthaley, 169 U. S., 353, 356, 362, 363.
Johnson *v.* Drew, 171 U. S., 93, 99.
Calhoun *v.* Violet, 173 U. S., 60, 63.

See also, to the same effect:

Telephone Co. *v.* U. S., 68 Fed., 542, 569.
U. S. *v.* Winona & St. P. R.R., 67 Fed., 948, 955, 956.
Diller *v.* Hawley, 81 Fed., 651.
U. S. *v.* N. P. R.R. Co., 95 Fed., 864.
U. S. *v.* Steenerson, 50 Fed., 504, 508, 509.
Puget Mill Co. *v.* Brown, 54 Fed., 987, 991.

In Shepley *v.* Cowan (91 U. S. 330, 339, 340), speaking to this question, the court, by Mr. Justice Brewer, said:

"If the matter were open for our consideration, we might, perhaps, doubt as to the sufficiency of the proofs presented by the heirs of Chartrand to the officers of the Land Department to establish a right of pre-emption by virtue of the settlement and proceedings of their ancestor, or by virtue of their own settlement. Those proofs were, however, considered sufficient by the Register of the local land office, by the Commissioner of the General Land Office on appeal from the Register, and by the Secretary of the Interior on appeal from the Commissioner. There is no evidence of any fraud or imposition practised upon them, or that they erred in the construction of any law applicable to the case. It is only contended that they erred in their deductions from the proofs presented; and for errors of that kind, where the parties interested had notice of the proceedings before the Land Department, and were permitted to contest the same, as in the present case, the courts can furnish no remedy. The officers of the Land Department are specially designated by law to receive, consider, and pass upon proofs presented with respect to settlements upon the public lands, with a view to secure rights of pre-emption. If they err in the construction of the law applicable to any case, or if fraud is practised upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions; but, for mere errors of judgment upon the weight of evi-

dence in a contested case before them, the only remedy is by appeal from one officer to another of the Department, and, perhaps, under special circumstances, to the President."

In Steel *v.* Smelting Co. (106 U. S. 447, 450, 451), the court, by Mr. Justice Field, thus announced the doctrine:

"We have so often had occasion to speak of the Land Department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that Department, overlook our decisions on the subject. That Department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions."

In Gonzales *v.* French (164 U. S. 338, 342, *supra*), as late as 1896, the court, by Mr. Justice Shiras, thus stated the crystallized rule:

"As the claim of the plaintiff in error to the land in question was passed upon by the proper local officers of the Land Department, and subsequently, upon appeal, by the Commissioner of the General Land Office, and, upon a further appeal, by the Secretary of the Interior, and as the result of the contest was the granting of a patent to the probate judge of the county of Yavapai as trustee of the inhabitants of the town of Flagstaff, the plaintiff, to main-

tain her bill, must aver and prove either that the Land Department erred in the construction of the law applicable to the case, or that fraud was practiced upon its officers, or that they themselves were chargeable with fraudulent practices. Johnson *v.* Towsley, 13 Wall. 72; Moore *v.* Robbins, 96 U. S. 530; Steel *v.* Smelting Co., 106 U. S. 447."

In Johnson *v.* Drew (171 U. S. 93, 99) the court, by Mr. Justice Brewer, said:

"Whether a party was or was not in possession of a particular tract at a given time is a question of fact, depending upon parol testimony; and if there is any one thing respecting the administration of the public lands which must be considered as settled by repeated adjudications of this court, it is that the decision of the Land Department upon mere questions of fact is, in the absence of fraud or deceit, conclusive, and such questions cannot thereafter be relitigated in the courts."

In Calhoun *v.* Violet (173 U. S. 60, 63), at the last term of the court, the altogether familiar doctrine is announced, by Mr. Justice White, as follows:

"It is elementary that, although this court will determine for itself the correctness of legal propositions upon which the Land Department of the Government may have rested its decisions, it will not, in the absence of fraud, re-examine a question of pure fact, but will consider itself bound by the facts as decided by the Land Department in the due course of regular proceedings, had in the lawful administration of the public lands."

Baldwin *v.* Stark (107 U. S., 463, *supra*), which came to this court by writ of error to the Supreme Court of the State of Nebraska, was an original bill filed for the purpose of enjoining the grantee of one Van Pelt, to whom a patent had been issued, from prosecuting a suit of eject-

ment for the premises in controversy. The case was tried in the State court upon the record of the proceedings before the Land Office, including the evidence upon which the patent was issued, and the transcript in this court showed that all questions involved were decided by the Department in favor of the complainant, except one, which was that he was disqualified under the pre-emption law, because of the fact that he had previously exercised another pre-emption right. The record showed that this particular question was much contested before the Land Department and much testimony taken thereon. The Supreme Court of the State assumed jurisdiction of the question and held that the Land Department had decided the question erroneously, and by writ of error this decision was brought to this court for review. In disposing of the case, this court, by Mr. Justice Miller, reversed the judgment below, holding that the question whether Stark had at any time previously exercised the pre-emption right was one of fact and concluded by the departmental decision. In its opinion the court said (p. 455):

"It has been so repeatedly decided in this court, in cases of this character, that the Land Department is a tribunal appointed by Congress to decide questions like this, and when finally decided by the officers of that Department the decision is conclusive everywhere else as regards all questions of fact, that it is useless to consider the point further. Where fraud or imposition has been practised on the party interested, or on the officers of the law, or where these latter have clearly mistaken the law of the case as applicable to the facts, courts of equity may give relief; but they are not authorized to re-examine into a mere question of fact dependent on conflicting evidence, and to review the weight which those officers attached to such evidence. Johnson *v.* Towsley, 13 Wall. 72; Gibson *v.* Chouteau, *id.* 92; Shepley *v.* Cowan, 91 U. S. 330; Marquez *v.* Frisbie, 101 *id.* 473."

Heath *v.* Wallace (138 U. S. 585; *supra*), was an action in ejectment reaching this court upon error to the Supreme Court of the State of California. The plaintiff claimed through the State under the swamp-land grant of 1850 as confirmed, in California, by the special act of July 23, 1866. The defendant claimed under a patent which had been issued to him upon a pre-emption claim. The claim of title in the plaintiff rested upon the assertion that, under the operation of the two swamp acts, land which had been returned by the surveyor as "subject to periodical overflow" was "swamp and overflowed" within the meaning of the said acts. The direct question presented in this court was whether an adjudication by the Interior Department that these terms were not synonymous and that the land in question, described as above, was not swamp and overflowed, was final and conclusive. The court so held, and in expressing its opinion upon that question Mr. Justice Lamar, speaking for the court, said:

"At any rate, the question whether or not lands returned as 'subject to periodical overflow' are within the descriptive terms of those granted by the swamp-land act—that is, whether they are 'swamp and overflowed'—is a question of fact properly determinable by the Land Department. It is settled by an unbroken line of decisions of this court in land jurisprudence that the decisions of that department upon matters of fact within its jurisdiction are, in the absence of fraud or imposition, conclusive and binding on the courts of the country. Johnson *v.* Towsley, 13 Wall. 72; Smelting Company *v.* Kemp, 104 U. S. 636; Steel *v.* Smelting Co., 106 U. S. 447; United States *v.* Minor, 114 U. S. 233, and many other cases. We are of opinion, therefore, that the decision of the Land Department on a question of the actual physical character of certain lands is not subject to review by the courts. And that consideration is sufficient to dispose of the first assignment of error against the plaintiff in error."

Beley *v.* Naphtaley (169 U. S. 353, *supra*) was a suit in ejectment coming to this court from the Circuit Court of the United States for the District of California. The plaintiff claimed title through a patent issued under the 7th section of the special act of Congress of July 23, 1866 (14 Stat. 218, 220), confirming to purchasers "in good faith" lands formerly covered by Mexican grants which had been rejected and where the lands so purchased had been excluded from the final survey of such grant. The defendants made no pretence of title emanating from the United States, but relied upon possession and the claim that the patent upon which the plaintiff relied was not valid under said act, because, among other reasons, the purchaser to whom the patent issued was not a purchaser "in good faith." This claim was based upon the fact that the purchase had been made twenty years after the claim had been rejected by the Board of Commissioners appointed under the act of 1851, to adjudicate such claims, eighteen years after it had been rejected by the District Court and thirteen years after rejection by the Supreme Court of the United States. The Department had considered and overruled these objections prior to the issue of the patent. In deciding this question as thus presented this court sustained the patent and, in announcing its opinion, by Mr. Justice Peckham, said (p. 363):

"We do not think the facts thus stated show, as matter of law, that Millet could not have been a *bona fide* purchaser of these lands for a valuable consideration. And whether in fact he were such *bona fide* purchaser was a question to be determined by the Government on issuing the patent, and an enquiry into that question of fact is precluded by the patent itself."

Lee *v.* Johnson (116 U. S., p. 48, *supra*) is a case peculiarly persuasive, if not absolutely conclusive, in the case at

bar. It was a suit in equity, coming to this court in error to the Circuit Court of Emmet County, State of Michigan. The defendant in the court below, Lee, held under a patent of the United States issued to him under the homestead laws, and suit was brought to charge him as trustee, and to compel a conveyance to the plaintiff, Johnson. The latter claimed an equitable title founded upon certain facts which, he claimed, established such an equity. He had entered the land under the homestead laws and had thereafter so connected himself with the fract by occupancy, residence, cultivation, etc., as to entitle him, as he claimed, to a patent. While so holding the land, contest was brought against him by Lee for abandonment, under the provisions of Section 2297 R. S., U. S., which section authorized such a contest upon charge of abandonment of a homestead entry for six months at any one time. This contest was heard in the usual manner in the Land Department, and resulted eventually in a decision by the Secretary of the Interior under which the entry of Johnson was canceled. Whereupon, Lee entered the land under the homestead laws and procured the patent against which the complaint was directed. From the foregoing recital, it will be seen that all of the facts connected with the homestead claim of Johnson were considered and decided by the Department, and also the question whether, as so found, such facts in law constituted a valid claim, or whether, under such facts, the claim was invalid and should be canceled. It was claimed before the Land Department, on the part of Johnson, upon the facts established, that he, Johnson, had made his original entry in good faith for his own benefit; that his residence was a sufficient compliance with the law, and that he had not abandoned the land. Upon the other hand, these conclusions, as applied to the evidence, were disputed by Lee. After ascertaining the facts, it became necessary for the

Secretary to apply the law of the case in his ultimate conclusion. In other words, the question before the Secretary was a mixed one of law and fact, to a much greater degree than the one involved in the question at bar. In deciding the case, this court sustained the patent issued to Lee upon the grounds that these findings by the Secretary of the Interior, preceding the issue of said patent, were binding and conclusive upon the court. In thus deciding the case, the court, by Mr. Justice Field, said:

"The court does not interfere with the title of a patentee when the alleged mistake relates to a matter of fact, concerning which those officers may have drawn wrong conclusions from the testimony. A judicial inquiry as to the correctness of such conclusions would encroach upon a jurisdiction which Congress has devolved exclusively upon the Department. It is only when fraud and imposition have prevented the unsuccessful party in a contest from fully presenting his case, or the officers from fully considering it, that a court will look into the evidence."

* * * * * * *

"Without going into any detail of the evidence presented to the Commissioner and the Secretary of the Interior, but taking the general statement of its nature, which we have given, it is clear that their attention was drawn by it to the character of the settlement of Johnson, and that they considered whether his entry was made to acquire a home for himself or for his son-in-law, whether his residence had been sufficiently personal and continuous to save and perfect any right, if in fact he had ever initiated any, and whether or not he had abandoned the land. The findings of the Secretary upon any of these matters must be taken as conclusive, in the absence of any fraud and imposition such as we have mentioned. Upon this point it is only necessary to refer to the cases where this conclusive character of the action of the Department upon matters of fact cognizable by it has been expressly affirmed. Johnson *v.* Towsley, 13 Wall., 72; Shepley *v.* Cowan, 91 U. S., 330, 340; Moore *v.* Robbins, 96 U. S., 530, 535; Quinby *v.* Conlan, 104 U.

S., 420, 426; Smelting Co. *v.* Kemp, 104 U. S., 636, 640; Steel *v.* Smelting Co., 106 U. S. 447, 450."

Diller *v.* Hawley (81 Fed. 651, *supra*) is a case peculiarly applicable to that at bar, although the facts at bar are very much stronger to prove bad faith on the part of Hyde. In that case the final entry of one Hackley, under the timber and stone act of 1878, with eleven other similar entries, was canceled by the Commissioner of the General Land Office on the ground that it was made for the benefit of another. This cancellation was made after a hearing ordered by the Department, in which, however, none of the entrymen were sworn and in which there was no direct testimony that any of them had made any contract to enter land for the benefit of another. The testimony was entirely circumstantial, or, more correctly speaking, inferential, viz., that immediately upon entry they conveyed to one Bailey; that Bailey had induced them to make the locations, and that the claimants were by occupation and business other than those who would naturally have taken up such claims. From these circumstances, the Department found that the entries were not made in good faith; such entries were canceled, and the land was subsequently patented to others. The case turned, in this connection, upon the question whether the decision of the Land Department, resulting in the cancellation of these entries, was a *finding of fact.* The court consisted of Circuit Judges Gilbert and Ross and District Judge Hawley. The court held that the decision of the Department, holding that Hackley had acquired the land for speculative purposes and not in good faith, was a *question of fact,* which was conclusive upon the court. Judge Hawley, in delivering the opinion upon this point, said:

"In the administration and disposition of the public lands the decisions of the Land Department upon the questions of fact are deemed conclusive. It is only questions of law that are reviewable in the courts. Bishop of Nesqually *v.* Gibbon, 158 U. S. 165, 166; 15 Sup. Ct. 779, and numerous authorities there cited. The Secretary of the Interior found as a fact that the entry was made by Hackley 'for the purpose of acquiring the land for speculative purposes'; that the entry was not made 'in good faith, in harmony with the spirit and letter of the law.'"

Without attempting to cover, by a summary, all of the points decided in the above-cited cases, bearing upon the general question here under discussion, we invite attention to the fact that this court, in such authorities, has applied the principle of conclusiveness to all questions involving:

(*a*) The weight of evidence.

Shepley *v.* Cowan, 91 U. S. 340.
Baldwin *v.* Stark, 107 U. S. 465.
Sanford *v.* Sanford, 139 U. S. 642, 647.
Lee *v.* Johnson, 116 U. S. 49.
Quinby *v.* Conlan, 104 U. S. 425.

(*b*) The qualification of the settler as ascertained by applying law to established facts.

Steel *v.* Smelting Co., 106 U. S. 447, 451.
Baldwin *v.* Stark, 107 U. S. 463.

(*c*) The question of good faith, arising as a conclusion from established facts.

Beley *v.* Naphtaley, 169 U. S. 353, 356, 362, 363.
Lee *v.* Johnson, 116 U. S. 51.

Even if the question involved before the Secretary of the Interior in his adjudication against Hyde was a mixed question of law and fact (which we deny under the authorities

above cited), nevertheless the Departmental decisions therein would be conclusive upon this court.

Marquis *v.* Frisbie, 101 U. S. 473, 476.
Quinby *v.* Conlan, 104 U. S. 420, 425.

Marquis *v.* Frisbie (101 U. S. 437, *supra*) was a suit arising in the courts of the State of California, by petition of the plaintiff, Marquis, against Frisbie, the defendant, setting forth several reasons why a decision of the Secretary of the Interior against the pre-emption claim of said Marquis and in favor of Frisbie was erroneous, and praying a decree declaring the plaintiff to be the equitable owner. The grounds upon which the complaint was based were, first, that the Land Department mistook the law of the case and, second, that its decision was obtained by fraud. A demurrer to this petition was affirmed by the courts below and the case reached this court upon writ of error. In deciding the case, this court affirmed the judgment of the courts below upon both of the questions involved, and upon the first of such questions, whether the Land Department had mistaken the law of the case, the court, in its opinion, by Mr. Justice Miller, said (p. 476):

"As we have already said, the argument of counsel is that the bill which was demurred to makes a case of mistake and of fraud and imposition within the meaning of these decisions.

"Let us inquire first into the alleged mistake of law by the Land Department.

"The language of this court in Moore *v.* Robbins, cited above, is that equity will interfere 'when it is *clear* that these officers have, by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another.'

"This means, and it is a sound principle, that where there is a mixed question of law and of fact, and the court cannot so separate it as to see clearly where the mistake of law is,

the decision of the tribunal to which the law has confided the matter is conclusive.

"But if it can be made entirely plain to a court of equity that on facts about which there is no dispute, or no reasonable doubt, those officers have, by a mistake of the law, deprived a man of his right, it will give relief."

Quinby *v.* Conlan (104 U. S., p. 420, *supra*) was an action in ejectment arising in the State of California, which reached this court in error to the Supreme Court of that State. The answer of the defendant was a denial of the declaration in ejectment followed by a special count by way of cross-complaint setting up an equitable defense. This equitable defense consisted of alleged erroneous rulings of the Land Department upon two matters: First, the possession and improvement of the lands by the parties claiming a pre-emption right to them; second, an ascertainment of the time when, in law, a portion of the lands in controversy formerly within the claimed limits of the Mexican grant were, by survey, segregated from such Mexican grant and opened to settlement and pre-emption. The case reached this court with the question before it whether the decision of the Department upon these two questions was final and conclusive. This court so held and in rendering such, its decision, by Mr. Justice Field, said:

"But independently of this conclusion there is a general answer to the alleged erroneous rulings of the officers of the Land Department as grounds for the interference of the court. Those rulings were upon mere matters of fact, or *upon mixed questions of law and fact*, which were properly cognizable and determinable by the officers of that Department.

"The laws of the United States prescribe with particularity the manner in which portions of the public domain may be acquired by settlers. They require personal settlement upon the lands desired and their inhabitation and im-

provement, and a declaration of the settler's acts and purposes to be made in the proper office of the district, within a limited time after the public surveys have been extended over the lands. By them a land department has been created to supervise all the various steps required for the acquisition of the title of the Government. Its officers are required to receive, consider, and pass upon the proofs furnished as to the alleged settlements upon the lands, and their improvement, when pre-emption rights are claimed, and, in case of conflicting claims to the same tract, to hear the contesting parties. The proofs offered in compliance with the law are to be presented, in the first instance, to the officers of the district where the land is situated, and from their decision an appeal lies to the Commissioner of the General Land Office, and from him to the Secretary of the Interior. For mere errors of judgment as to the weight of evidence on these subjects, by any of the subordinate officers, the only remedy is by an appeal to his superior of the Department. The courts cannot exercise any direct appellate jurisdiction over the rulings of those officers or of their superior in the Department in such matters, nor can they reverse or correct them in a collateral proceeding between private parties. * * *

"It would lead to endless litigation, and be fruitful of evil, if a supervisory power were vested in the courts over the action of the numerous officers of the Land Department, on mere questions of fact presented for their determination. It is only when those officers have misconstrued the law applicable to the case, as established before the Department, and thus have denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practised, necessarily affecting their judgment, that the courts can, in a proper proceeding, interfere and refuse to give effect to their action. On this subject we have repeatedly and with emphasis expressed our opinion, and the matter should be deemed settled. Johnson *v.* Towsley, 13 Wall. 72; Shepley *v.* Cowan, 91 U. S. 332–340; Moore *v.* Robbins, 96 *id.* 530."

In answer to our contention as to finality in the Secretary's decision, counsel for plaintiff in error cite the following cases, which they claim to be authority for their proposition that, in cases where injustice has been done, this court will inquire into *facts*, as well as law, notwithstanding a decision by the Land Department.

Cunningham *v.* Ashley, 14 How., 377.
Barnard *v.* Ashley, 18 How., 43.
Lytle *v.* Arkansas, 22 How., 193.
Lindsey *v.* Hawes, 2 Black., 554.
State *v.* Batchelder, 1 Wall., 109.
Railroad Company *v.* Smith, 9 Wall., 95.
Shepley *v.* Cowan, 91 U. S., 330.
Moore *v.* Robbins, 96 U. S., 530.
Stewart *v.* McHarry, 159 U. S., 643.

The slightest reference to these cases will show that in the main they have no application whatever to the case at bar and that in none of them is the doctrine contended for by opposing counsel declared or announced.

The first four of said cases,—Cunningham *v.* Ashley, Barnard *v.* Ashley, Lindsey *v.* Hawes, and Lytle *v.* Arkansas, were all cases which arose in this court not later than the December Term, 1862, before the present doctrine on this subject had become well established by repeated decisions of the court. All of these four cases involved questions arising upon *ex-parte* proofs, only, in pre-emption cases, where the pre-emption title thus initated came in conflict with other titles asserted under the laws of the United States, where there was no notice of the pre-emption proceedings and where there was never, at any time, any trial had between the parties, or other adversary proceedings. Still further, most, if not all, of the pre-emption rights involved were initiated or perfected prior to the act

of July 4, 1836, under which appellate jurisdiction was first conferred upon the Commissioner of the General Land Office and the Secretary of the Interior. And in the last-mentioned case the charge against the pre-emption entry involved fraud,—one of the exceptions to the general rule. It is obvious, therefore, that none of these cases are authority for the proposition of counsel.

As to the remaining five cases cited, not one of them, even inferentially, sustains the contention of our adversaries.

State *v.* Batchelder (1 Wall. 115) the only one of the authorities from which counsel make any quotation, was a suit in ejectment coming to this court from the Supreme Court of the State of Minnesota. The title of the plaintiff was based upon the school grant made to the territory of Minnesota, of sections 16 and 36. The title upon which the defendant made his defence was a patent issued upon a pre-emption claim to two persons, the grantors of the defendant. To this defence, the plaintiff, by replication, alleged that the patent had been obtained by fraud and misrepresentation as to compliance made with law by the pre-emption claimants in respect to settlement, residence, and improvement. The proceedings upon the issue of the patent were entirely *ex-parte* and no trial was ever had between the parties. The court below held that the decision of the Department prior to the issuance of the patent was conclusive upon the court. This court, upon the appeal, reversed the decision of the court below, expressly, however, upon consideration of the fact that the proceedings upon the issue of the patent were entirely *ex-parte*. Counsel for plaintiff in error, in their brief, quote only a portion of the language of the court upon this question. The entire language of the court (p. 115) is as follows:

"These questions have been so often before this court, and were so fully considered in the last case (Lindsey *et al.* *v.* Hawes *et al.*), where the authorities are collected, that it would be a waste of time to re-examine them.

"A court of equity will look into the proceedings before the Register and Receiver, and even into those of the Land Office or other offices, where the right of property of the party is involved, and correct errors of law or of fact to his prejudice. The proceedings are *ex-parte* and summary before these officers, and no notice is contemplated or provided for by the pre-emption laws as to parties holding adverse interests, nor do they contemplate a litigation of the right between the applicant for a pre-emption claim with a third party. The question as contemplated is between the settler and the Government, and if a compliance with the conditions is shown to the satisfaction of the officers, the patent certificate is granted."

Railroad Company *v.* Smith (9 Wall. 95) involved nothing more than the question whether parol testimony was admissible to determine the character of the land as swamp and overflowed or otherwise at the date of the Swamp Land grant, and neither involved, nor in its decision reached, the question here under discussion.

In Shepley *v.* Cowan (91 U. S. 330) we have hereinbefore cited and quoted the precise language of the court, wherein the doctrine for which we contend was specifically and plainly announced.

In Moore *v.* Robbins (96 U. S. 530, 535) the court, instead of sustaining the contention of our adversaries, after citing and reaffirming Johnson *v.* Towsley, 13 Wall. 72, and Shepley *v.* Cowan, 91 U. S. 340, thus announced the well-known doctrine:

"The decision of the officers of the Land Department made within the scope of their authority on questions of this kind, is, in general, conclusive everywhere, except when reconsidered by way of appeal within that Department; and

that as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in a court of justice when the title afterwards comes in question."

In Stewart *v.* McHarry (159 U. S. 643) the court, instead of holding that it would review facts previously determined by the Department, declares exactly to the contrary in the following words (p. 650):

"The Supreme Court held that Stewart's ownership and title were sufficient to entitle him to an additional farm homestead, and that the Land Department erred as matter of law in its conclusion in regard thereto, but that in respect of Stewart's residence on the land conveyed to him by his wife, that was a question of fact, and the court had no jurisdiction to re-examine the conclusions of the Land Department thereon in the absence of a clear showing that the decision was procured by fraud or imposition which did not appear in the case. With these views we concur."

Upon the foregoing considerations, we confidently submit that there can be, at this date, no debatable question respecting the conclusiveness of judgments by the Land Department upon questions of fact rendered in contested cases within its jurisdiction; that the case at bar is one of precisely that character, and that for this reason alone the decree of the court below sustaining the demurrers to plaintiff's cross-petition must be affirmed.

To avoid the inevitable result of the foregoing conclusion counsel for plaintiff in error advance the following propositions by way of excepting the case at bar from the operation of the general rule:

First. That the pre-emption claim of Hyde was not involved in any issue made in the case which resulted in the cancelation of the Sioux Half-Breed scrip location, and that

for this reason the action of Secretary Vilas and Secretary Noble in that case, upon that question, was mere *obiter*.

Second. That the testimony given in said case by Hyde, McDonald, and White was improperly considered by Secretaries Vilas and Noble as applicable to the pre-emption claim of Hyde.

Third. That Hyde's contest against the Warren scrip location was dismissed without notice to said Hyde, and that the decisions of the Department relative to his position in the case as a preferred claimant are not binding upon the court.

We notice each of these propositions in the order above stated.

First.

That the Pre-emption Claim was not in Issue.

Answering this claim on the part of our adversaries, we submit the following counter propositions:

(*a*) As a matter of fact this exact question was put in issue by the pleading.

(*b*) Even if this be otherwise, still the Secretary of the Interior with the testimony before him had jurisdiction to decide the pre-emption claim of Hyde, and it was his duty under the law to so proceed.

(*a*) The condition of this question, as shown by the pleadings, fully appears by the recitation of facts in the decision of Secretary Vilas of February 18, 1889 (Appendix No. 1), and the decision of Secretary Smith of December 21, 1894 (Appendix No. 4). From these recitations, which are, of course, as findings of fact, conclusive upon Hyde, it appears that the application of Hyde filed October 9, 1884, asking to be allowed to contest the Sioux Half-Breed location, as a material part thereof and as part of his case,

affirmatively set up and pleaded his pre-emption claim and his right to the land thereunder; that, so pleading and so showing himself to be entitled, he averred that he was possessed of all the necessary qualifications essential to a pre-emption claim; that he had theretofore made a settlement upon the land with a view to pre-emption; that he intended to make a declaratory statement of the same under the pre-emption law as soon as the land was surveyed, and that he thereupon, and upon the grounds stated, asked that a day be set for a hearing. Attached to this application to contest was a verification of the facts therein alleged. It further appears that upon the 20th day of July, 1885, as soon as the land was surveyed, Hyde, in conformity to the notice given in his application to contest, applied at the local land office to file a declaratory statement, which was rejected, so far as the land involved in the Sioux Half-Breed location was concerned, by the Register and Receiver, on the ground of such prior appropriation; that Hyde appealed from this decision; that such appeal was transmitted to the General Land Office August 25, 1885, and that November 14, 1885, the Commissioner, upon consideration of the papers then before him, namely, the application to contest and the appeal from the decision rejecting Hyde's declaratory statement, ordered a hearing. This letter of the Commissioner ordering a hearing was, in part, as follows:

"In view of the conflicting statements respecting the legality of these locations, I deem it proper that a hearing should be had, that the respective parties may have an opportunity to submit such proof as they may have *in support of their allegations*, and that this office may be possessed *of all the facts possible in the matter*."

It still further appears from the recitations of these decisions that under this order of the Commissioner a hearing

was had, at which it was assumed by all parties, including the plaintiff in error, that the pre-emption rights of Hyde and McDonald were involved; that voluminous testimony was taken not only with respect to the rights of the scrip locators, but also with respect to the rights of the pre-emptors; that upon the conclusion of such hearing the Register and Receiver held the scrip locations to be valid; that in view of this finding they held it to be unnecessary to pass upon the *bona fides* of Hyde and McDonald in respect to their rights under the pre-emption law; that thereupon Hyde appealed from said decision to the Commissioner of the General Land Office; that the decision of the Commissioner was adverse to the scrip locations and held the same for cancellation, but without making any direct disposition of the pre-emption claims; that thereupon the scrip claimants appealed to the Secretary of the Interior, and that with this appeal all the papers hereinbefore referred to, including the appeals of Hyde and McDonald from the decision of the Register and Receiver, were transmitted to the Secretary for his consideration. The findings and conclusions of Secretaries Vilas and Noble upon the question as to whether these pleadings made an issue before them involving the validity of the pre-emption claims, we have already set out in full in this brief. Both Secretaries held and decided that under the practice of the Department these pleadings raised such an issue, and that upon the same it was the duty of the Department to dispose of the pre-emption claims.

We submit that by these proceedings Hyde voluntarily and in strict legal form put his pre-emption claim, so far as it had then progressed, before the Department for adjudication. So far as a contest under the act of May 14, 1880, was concerned, the assertion of his pre-emption claim was

not an essential element. As we have heretofore pointed out, a contestant under the provisions of that act need not necessarily have any connection at all with the title. He may be an entire stranger to the paramount source of title, and his contest may be, and almost always is, conducted solely with the expectation of making use of the thirty days' preference right awarded in case of successful result. When, therefore, Hyde, instead of adopting the usual and ordinary form of contest under the act of 1880, filed an application averring his own connection with the paramount source of title, he necessarily excluded the idea of a contest under the act of 1880 and put himself within the other class of contestants in which the respective claims of individuals are arrayed against each other for disposition by the Department.

It is claimed by counsel in their brief (page 21) that the averment of Hyde's qualifications as a pre-emptor in his application to contest was nothing more than a compliance with "a rule of the Commissioner of the General Land Office made May 28, 1883," which had been subsequently changed; and eight departmental decisions are cited as showing such revocation.

No reference is given to show where the "rule" thus invoked can be found and no mention of the same is made in any of the cases cited, which cases, however, all positively hold that no such averment of qualifications is necessary in commencing a contest to secure a cancellation. By diligent search through the land literature of that period, however, we find, in a Secretary's decision not among those cited by counsel, a statement that upon the date mentioned, May 28, 1883, the Commissioner addressed a letter to the Register and Receiver at Huron, Dakota, directing those officers to require a contestant to file with his application proof of his qualifications to make an entry. This was not

a general letter to all the offices; there is no suggestion, even, that any such letter ever went to the Duluth office, and the Huron letter was specifically overruled by the Secretary a year before Hyde commenced his contest. (Bailey *v.* Olson, 2 L. D. 40, 41, Nov. 10, 1883; see, also, Koons *v.* Elsner, 2 L. D. 66, April 15, 1884.) The decision of Secretary Teller, in Bailey *v.* Olson, was as follows:

"The application to contest was denied, however, not as generally insufficient, but for the reason that Bailey had not complied with your instructions to the district officers at Huron, of date May 28, 1883, requiring a contestant to file with his allegations of contest an application to enter the land, together with proof of his qualifications to make entry, as an earnest of his intention to claim the benefit of the preference right accorded by the act of May 14, 1880 (21 Stat. 140).

"In my judgment, this was not good reason. There is nothing in that act providing for the initiation of contest, the whole law on that subject being embraced in Sec. 2297 of the Revised Statutes. The preference right allowed is to be exercised by making entry within thirty days from notice of cancellation, and not by a pre liminary application. This Department cannot make legislative requirements, nor can it superadd thereto, except to make regulations not inconsistent therewith for carrying into effect the provisions of the law. Now, this provision is a mere privilege, which the contestant may waive even after notice; and, consequently, no obligation can be imposed upon him at the inception of the contest to avail himself of its beneficial grant. He may take or refuse to take the land at his pleasure.

"I do not find that you have issued this instruction to the land offices generally, nor is there any record in the case showing that it had been given to the Aberdeen office, so far as my examination of the papers goes. But possibly you have not transmitted the order for my information."

With great respect for the learned counsel for plaintiff in error, we submit that a casual letter written by the Com-

missioner to Huron, Dakota, and not published, expressly overruled by a Secretary's decision, published in the usual manner, a year prior to Hyde's contest, can hardly be said to have impelled him to affirmatively plead his pre-emption claim against the Sioux Half-Breed location.

There has never been, so far as we can ascertain, any law, rule, or requirement of the kind specified, except in the single instance of contests under section 3 of the timber-culture act of June 14, 1878 (20 Stat., 114). That act provided for forfeiture of an entry for failure to comply with certain requirements, the land in such case to be thereafter "subject to entry under the homestead laws or by some other party under the provisions of this act." It was for a short time held, under this exceptional provision, that the contestant was required, with his affidavit of contest, to file an application to enter the land under one of the statutes mentioned. (Bundy *v.* Livingston, 1 L. D., 152; Circular of December 20, 1882, 1 L. D., 651.) This ruling, however, even as applied to that act, was always doubted, and was shortly thereafter overruled. (General Circular of June 27, 1887, 6 L. D., 284.)

The fact, therefore, that in commencing a proceeding against the Sioux Half-Breed scrip, Hyde adopted the usual form for an averment of a pre-emption claim, shows not only that he in form became a contestant in the class where different rights under the paramount source of title are put in comparison but, further, that such was his deliberate purpose and intent.

Another consideration leads to exactly the same conclusion. If Hyde was intending to initiate a claim merely under the act of 1880 and did not intend to put his pre-

emption right in issue, his allegation of the same was not only entirely unnecessary but also the most preposterous mistake of pleading. He cannot be assumed to have so pleaded for no purpose at all, and inasmuch as he was not required to so plead in the proceeding under the act of 1880, it must be that the course adopted was intended to at least bring before the Department such an equitable claim in himself as would have force and weight in determining the other issue as to cancellation of the prior Sioux Half-Breed location.

As to the effect to be given, in departmental pleadings, to such an application, there can be no possible question. Although cases in the Department, under the rules of practice, are intended to present or raise certain specific questions for decision, yet it has been invariably held from the earliest date that wherever, upon all the papers as presented, any particular question was raised or suggested, that question was within the power of the Department to decide. In all these cases, as has been repeatedly held by this court and by the Department itself, the Secretary of the Interior acts in a dual capacity. He is, in the first instance, a special tribunal to decide between the rights of the conflicting claimants. He is also the guardian of the interests of the United States, and bound by the law, no matter in what form the pleadings may appear, to protect the interests of the Government and prevent the consummation of any act prohibited by the policy of the public land laws.

In addition, it is to be borne in mind that, until Hyde was driven by the necessity arising from the cancellation of his claim, he never even intimated that his pre-emption claim was not in issue. From the very start until that date, as found by the Secretary, all parties connected with

the case proceeded upon the assumption that the preemption claim was involved in the issues and that it could be passed upon by the departmental officers.

(*b*) This question, however, has been directly passed upon by the Department and this court and must be considered, under these adjudications, as settled in favor of the jurisdiction of the Land Department in cases where upon the testimony action seems to be required even though the specific questions are not involved in technical issues.

The position of the Land Department upon this question is undoubted. It has been therein settled by a long and unbroken line of decisions by the Secretary of the Interior that it is the duty of that officer to cancel an entry or reject a claim whenever, in a contest before him, facts calling for such action appear, no matter how such facts are disclosed and without any reference whatever to the issues made between the parties.

Smith *v.* Brandes, 2 L. D., 95.
Condon *v.* Arnold, 2 L. D., 97.
Dayton *v.* Hause, 4 L. D., 263.
Litten *v.* Altimus, 4 L. D., 512.
Taylor *v.* Huffman, 5 L. D., 40.
Rue *v.* Faribault, 5 L. D., 260.
Burnett *v.* Crow, 5 L. D., 372.
Hegranes *v.* Londen, 5 L. D., 386.
Roe *v.* Schang, 5 L. D., 395.
Van Ostrom *v.* Young, 6 L. D., 25, 27.
Austin *v.* Thomas, 6 L. D., 330.
Overton *v.* Hoskins, 7 L. D., 394.
W. L. Rynerson, 7 L. D., 177.
Saunders *v.* Baldwin, 9 L. D., 391, 392.
Russell *v.* Gerold, 10 L. D., 19, 20.
Wells *v.* Hewitt, 11 L. D., 166.

Stenoien *v.* N. P. R.R. Co., 12 L. D., 495.
Ashwell *v.* Honey, 13 L. D., 121.
Carter *v.* Griffith, 13 L. D., 437.
Taylor *v.* Rogers, 14 L. D., 194, 195.
Alexander *v.* Hamlin, 17 L. D., 452.
Butler *v.* Geer, 18 L. D., 233.
Betts *v.* Shumaker, 21 L. D., 461, 462.
Moores *v.* Sommer, 22 L. D., 217, 221.
Seixas *v.* Glazier, 26 L. D., 49, 52, 53.

And the decisions of this court are equally plain and explicit.

Knight *v.* U. S. L. Assn., 142 U. S. 161.
Lee *v.* Johnson, 116 U. S. 48.
See Coppell *v.* Hall, 7 Wall. 542.
Oscanyan *v.* Arms Co., 103 U. S. 261.

In Knight *v.* U.S. Land Association (142 U. S. 161,177), speaking to this question and referring to section 441 of the Revised Statutes, conferring upon the Secretary of the Interior supervision over the disposition of the public lands, this court, by Mr. Justice Lamar, said:

"The phrase, 'under the direction of the Secretary of the Interior,' as used in these sections of the statutes, is not meaningless, but was intended as an expression in general terms of the power of the Secretary to supervise and control the extensive operations of the Land Department of which he is the head. It means that, in the important matters relating to the sale and disposition of the public domain, the surveying of private land claims and the issuing of patents thereon, and the administration of the trusts devolving upon the Government, by reason of the laws of Congress or under treaty stipulations, respecting the public domain, the Secretary of the Interior is the supervising agent of the Government to do justice to all claimants and preserve the rights of the people of the United States. As

was said by the Secretary of the Interior on the application for the recall and cancellation of the patent in this pueblo case (5 Land Dec. 494): 'The statutes, in placing the whole business of the Department under the supervision of the Secretary, invest him with authority to review, reverse, amend, annul or affirm all proceedings in the Department having for their ultimate object to secure the alienation of any portion of the public lands, or the adjustment of private claims to lands, with a just regard to the rights of the public and of private parties. Such supervision may be exercised by direct orders or by review on appeals. The mode in which the supervision shall be exercised in the absence of statutory direction may be prescribed by such rules and regulations as the Secretary may adopt. When proceedings affecting titles to lands are before the Department the power of supervision may be exercised by the Secretary, whether these proceedings are called to his attention by formal notice or by appeal. It is sufficient that they are brought to his notice.'"

In Lee *v.* Johnson (116 U. S. 48, 51, 52) this very question directly arose and was directly decided. In disposing of it the court, speaking by Mr. Justice Field, said:

"The Supreme Court of Michigan held the decision of the Secretary of the Interior inconclusive, because it was not upon a point in issue between the contestants, stating that the question was that of abandonment, which only was inquired into by the register, or could be considered on appeal; that the jurisdiction of the Secretary, if he disposed of the case finally on other grounds, was not appellate but original, and that this had not been conferred; that the register on the hearing and the Commissioner on appeal had decided that the plaintiff had not abandoned the land, and upon that ground there was no reversal of the decision. It, therefore, held that the plaintiff was entitled to the relief prayed.

"While there are no formal pleadings in such cases, it is undoubtedly true, as a general rule, that in contested matters before the Land Department, as in those before the

courts, the decision should be confined to the questions raised by the allegations of the respective parties; but this rule has its exceptions. If in any case it appears from the evidence that the claim of the complaining or moving party is against public policy or the law, so that in no event could he recover a final judgment or decision, whatever be the nature or extent of the testimony upon the point at issue, the tribunal should not hesitate to dismiss the suit or the proceeding."

We accordingly, upon the particular question now under consideration, submit: first, that the question of the validity of the pre-emption claim of Hyde was directly put in issue, and as so put in issue was pending before Secretaries Vilas and Noble upon the appeal in the original case; and, second, and that whether this be so or not, these Secretaries, under the supervisory power conferred upon them by law, had full jurisdiction, and it was their duty to decide the question presented by the evidence, to declare these pre-emption claims invalid, and, so far as they had progressed, necessarily subject to cancellation.

Second.

That the testimony was improperly applied.

The contention of the plaintiff in error is that the testimony upon which Secretary Vilas decided the pre-emption claim to be invalid, was not pending before him in the case of Hyde—that is to say, it was not so pending for any purposes affecting such pre-emption claim. The proposition is that such testimony was before the Department in the McDonald case but not in that of Hyde. This, in effect, is the whole contention upon this point.

The facts upon which this contention rests, as hereinbefore recited in our statement, are as follows:

Hyde presented an application to contest a portion of the Sioux Half-Breed scrip location with scrip No. 19 D. (Tr., p. 16.) McDonald, at the same time, filed an application to contest the residue of the land covered by the scrip location with No. 19 E. (Tr., p. 17.) These applications were identical in form and allegations. (Secretary Vilas' decision of February 18, 1889, Appendix No. 1.) Each of these applications being rejected, Hyde and McDonald, respectively, appealed to the Commissioner. The order of the Commissioner directing a hearing treated the applications and appeals, thus as aforesaid identical in form and effect, as forming practically one proceeding; and, so proceeding, ordered a hearing therein precisely as though the proceedings were all taken in one and the same case. (Tr., pp. 25, 26.) The notices to Hyde and McDonald, respectively, were necessarily, from the very nature of the situation, separate and distinct, although the same day was fixed in each for appearance and trial. (Tr., pp. 26, 27.) Subsequently, Hyde and McDonald, represented by the same counsel, appeared on the same day, the 6th day of April, 1886, and the cases proceeded exactly as though they had been formally consolidated and were to be tried as one. Inasmuch as the allegations as to settlement and residence of the respective pre-emption claimants were distinct and separate subjects of consideration, one of the two necessarily preceded the other in the order of taking testimony. It appears from all the papers that the McDonald case was first taken up and testimony, both on behalf of the contestant, McDonald, and on behalf of the scrip claimants, was taken at great length. Whereupon, evidently to save time and expense in repeating the testimony, all the parties, including the scrip claimants and Hyde and McDonald, entered into a stipulation, of record in the proceedings, which was as follows:

"It is hereby stipulated and agreed upon that this testimony shall be considered in determining the validity of both locations of scrip 19 D. and 19 E."

Upon testimony thus taken and stipulated for, the Register and Receiver proceeded to decide all the claims presented. Determining, however, that the Sioux Half-Breed scrip location was valid, the local officers found no necessity, as they expressly state, for passing upon the pre-emption claims of Hyde and McDonald. The Commissioner, reviewing this decision, reversed the Register and Receiver and held the scrip location invalid, making no disposition of the pre-emption claims. The appeal by the scrip claimant took all the papers in the record to the Secretary's office, which officer, considering and deciding upon all the claims, just as did the Register and Receiver, determined from the testimony that the pre-emption claims were invalid.

We invite the attention of the court to the fact that nowhere, in the course of all the proceedings before the Interior Department, in all of the cases we have recited, and in all of the decisions mentioned, was this contention now relied upon in this court ever raised or presented to the Department. It was persistently asserted that the pre-emption claims were *not in issue*, but in no single instance, in all of the cases, so far as we can discover, was there any suggestion made that the entire testimony taken upon the point in question did not embrace both Hyde and McDonald if such testimony was properly in the case for any purpose. In other words, prior to the filing of the cross-petition in the case at bar, it seems to have been assumed upon all sides that the stipulation in question was subject to but one construction, viz., that it carried into the case the whole of the testimony and made the same applicable to Hyde as well as McDonald.

That this stipulation was intended to carry into the case

the entire testimony which up to that time had been taken, so as to make the same applicable to all parties to the controversy, must, upon the slightest reflection, be conceded.

To determine the real meaning and effect of the stipulation consideration must, of course, be given to the situation to which it was intended to apply. The cases had come on for hearing under the order of the Commissioner and the notice given by the Register and Receiver at the same hour of the same day. So far as the allegations against the scrip locations are concerned, the charges were identical, and testimony to support one would support the other. The parties were represented by the same counsel. Testimony was first taken on behalf of the contestants in an attempt to show the invalidity of the scrip locations. Just exactly why, or under what circumstances, the contestants Hyde and McDonald and their attorney White came upon the stand is not disclosed by the record, further than that they must have been called on behalf of the contestants. This will appear by reference to the Transcript, pages 18 and 19, where the testimony of these witnesses purports to be set out in full in the cross-petition. As to McDonald's evidence, the record shows: first, some "testimony" of McDonald; second, a "redirect examination" obviously in the interest of the contestants; third, a "cross-examination" obviously in the interest of the scrip claimants. This order of examination necessarily indicates that the damaging testimony came out in a cross examination of the witness after he had been placed on the stand in his own behalf to establish the pre-emption claim in himself, which he had affirmatively pleaded. This being so, the fair presumption is that the testimony of Hyde and White was brought out under similar circumstances. When, therefore, the testimony in respect to one of the claims was concluded and it was then stipulated that what had been taken

should go into the case as applied to both, it must have been intended that this cross-examination, developing these particular facts, was to go in with the rest. Otherwise the court is seriously asked to believe that the Sioux Half-Breed scrip claimant agreed that the testimony of these witnesses should go in against him, *without the benefit of the cross-examination.* This consideration alone reduces the proposition of our opponents to absurdity. Such could never have been the united understanding of the parties.

Another consideration leads to precisely the same result, so far as the obvious intent of the parties is concerned. The scrip claimant could well and very advantageously have consented to the application of all the testimony, including this cross-examination, to his entire location; for he may well have reasoned, as it afterwards resulted, that such testimony demonstrated the absolute illegality of the claim which was set up against him, in which event all that was necessary for him to do to make perfect defence would be to show that the questions of law raised upon the facts against his scrip locations were without merit. It was undoubtedly the advantage which he was to have from the effect of this testimony which induced him to enter into the stipulation.

Another consideration is equally conclusive. The entire record shows that the attack made upon the Sioux Half-Breed scrip locations was all in one and the same interest, either Hyde and McDonald acting in common for the benefit of their respective claims, or, as undoubtedly appears from the evidence in the case, these two persons acting in the interest of some third party. Whichever of these two ways it was, the movement was a common one; the same counsel represented the united movement, and every step taken in one case was identical with a similar step taken in the other.

Is it possible that counsel, representing two claimants, in exactly the same way, in substantially the same proceeding, by this stipulation intended to put, or in fact put, one of his clients in a better position than the other?

But, however this may be, it is entirely clear that in such a proceeding as this in the Land Department the Secretary of the Interior would, in the exercise of his supervisory jurisdiction, be entirely at liberty and undoubtedly be required by his duty, under the authorities we have hereinbefore cited, to reject the claim of Hyde under the circumstances stated, even though Hyde were not technically a party to the McDonald proceeding, and even though he had not intended to stipulate such testimony into the case. Hyde stood before the Register and Receiver in exactly the position of McDonald. He had the same adverse complaint against the scrip location. He had come into the office of the Register and Receiver in answer to precisely the same summons at precisely the same hour. He was there represented by the same counsel. He heard in that case the damaging testimony which showed his claim to be illegal. Still further, he actually went upon the stand, in the McDonald case, and testified upon that point. This left him in the position of one who stood silently by while testimony was given, including his own, showing his claim to be invalid, without attempting to make any defence in the premises. Under such circumstances he would be clearly estopped, especially in proceedings before the Land Department, to deny the legal force and effect of that testimony as against himself. He could in no sense be considered as a person whose claim was being investigated and rejected without an opportunity for defence.

In Vance *v.* Burbank (101 U. S. 519, 520), speaking of such a situation, this court, by Chief Justice Waite, said:

"It has also been settled that the fraud in respect to which relief will be granted in this class of cases must be such as has been practiced on the unsuccessful party, and prevented him from exhibiting his case fully to the Department, so that it may properly be said there has never been a decision in a real contest about the subject-matter of inquiry. False testimony, or forged documents even, are not enough, if the disputed matter has actually been presented to or considered by the appropriate tribunal. (*United States* v. *Throckmorton*, 98 U. S. 61; *Marquez* v. *Frisbie*, *supra*.) The decision of the proper officers of the Department is in the nature of a judicial determination of the matter in dispute.

"The operative allegation in this bill is of false testimony only. That testimony Scott had full opportunity of meeting. Rehearings were granted him when the case seemed to require it, and he took all the appeals the law gave. The last decision was given by the highest Department officer. If the evidence he presented to the register and receiver was not all considered on these appeals, it was clearly his own fault. It was more than six years from the time his first appeal was taken before the final hearing was had. No fraud is charged on the register and receiver, or on the heirs of Perkins in respect to the keeping back of the evidence. If any was in fact not sent forward, and Scott did not discover the omission until within one year of the time of the commencement of this suit, he must have been grossly neglectful of his own interests. He does not now state what the omitted evidence was, or that it was anything more than cumulative. The extent of his averment is that it strongly supported his claim in the contest. For we all know, the other evidence might have been equally strong, and might have covered the whole ground.

"As to the alleged fraud in the description of the compromise line, it is sufficient to say that, according to the bill, this fraud, if it in fact existed, was discovered long before the contest in the Land Department, and if it had any importance in the case the amplest opportunity was given to show the error and get relief against the agreement. This was one of the matters that might have been pre-

sented to the Land Department, and, therefore, is concluded by the decision of that tribunal."

We have already shown, under the authority of this court, that in this class of cases it is the duty of the Secretary of the Interior to enforce the law as against contracts of this kind contrary to its policy, wherever and however the information upon which he must proceed comes before him, subject only to the qualification that the party accused shall have had a fair chance to make defense. Even if all that is claimed as to the intention of Hyde in making this stipulation be true, he nevertheless is in the position of one who had ample opportunity to defend his claim against this testimony and failed to do so. The damaging facts were not established by adversary witnesses, but by the testimony of McDonald, his associate, of White his counsel, and of himself.

In addition, and as a most important consideration, the court will remember that nowhere, from the beginning to the end of the record, has the plaintiff in error ever denied the making of the contract in question or that it has always been and is now in full force and effect. The cross-petition covers thirteen pages of the printed transcript and undertakes to state the equitable defense with the utmost particularity. Yet, as before stated, there is nowhere in it any allegation or averment that a contract, of the kind described in the Secretaries' decisions, was not in fact made and is not now in existence.

Counsel for plaintiff in error at one or more places in their brief refer to the allegation of the cross-petition averring that the stipulation was intended for the purpose only of determining the validity of the scrip location and treat this allegation as though it were an averment of fact which would be admitted by the demurrer. This is obviously an

incorrect assumption. The only averment in the record, which is conceded by the demurrer, is the fact that the stipulation in the words above quoted was entered into between the parties. For what purpose it was admitted, and what the effect of it was when admitted, are questions which the defendant below cannot settle by mere averments.

In view of the foregoing considerations we submit: first, that the stipulation legally carried into the case, as against Hyde, all the testimony taken, including that quoted in the cross-petition; second, that even if this stipulation were not so intended, yet nevertheless the testimony in question having reached the Interior Department in a proceeding to which Hyde was practically if not technically a party and wherein he had full opportunity to submit a defence, it was the duty of the Secretary, under his supervisory power, to pass upon the claim.

Third.

The dismissal of Hyde's contest.

The claim in this connection asserted on the part of the plaintiff in error is that he made a valid application to contest the Warren Chippewa scrip location for the premises in controversy; that, upon such an application, a hearing was ordered; that subsequently this order for hearing was revoked and set aside by the Commissioner without notice to Hyde, and that all this deprived him of his pre-emption right to the land in controversy. The proposition of counsel, in this regard, as found in their brief (page 16) is as follows, the italics being our own:

"It will thus be seen that the Commissioner of the General Land Office, *without notice to Hyde*, dismissed his contest regularly and orderly initiated, pending before the

local land office, *contrary to the rules, regulations, and procedure of the Department*, and deprived him of his pre-emption right to the land in controversy."

The facts as shown by the record, upon this claim as founded, will be remembered as follows:

April 15, 1885, the land in question being then entirely open and free from claim, so far as the records of the local land office were concerned, and absolutely free except for the application to file declaratory statement by Hyde and his appeal to the Commissioner, said papers being then in Washington, Warren made entry of the land by the location thereon of his right of selection conferred by the treaty of 1854.

April 10, 1886, Hyde filed an application to contest this location of Warren, then by record covering the land, upon the ground that he, Hyde, had a prior, valid pre-emption right under his settlement made, as alleged, in 1884. (Tr., p. 16.) This application to contest so filed by Hyde, it will be observed, was four days after the date of the trial of his contest against the Sioux Half-Breed scrip location, in which the testimony relative to the invalidity of his pre-emption claim had been given and while the same yet remained unacted upon by the Register and Receiver. It will be carefully noted that this contest was, beyond all question, one brought, not under the act of 1880, but as one of the other class of contests where an alleged superior right was set up against the claim or right of the contestee. Presumably, the papers in connection with this application were, in due time, forwarded to the Commissioner of the General Land Office.

December 22, 1888, over two years and one-half after the tender of this application at the local land office, the Commissioner, in a letter to the Register and Receiver,

ordered a hearing between the parties. (Tr., p. 16.) No copy of this order is pleaded and no information upon that point is in any other way exhibited to the court. A simple comparison of dates hereinbefore recited shows that, during the time intervening between the tender of this application and the above-noted action thereon by the Commissioner, the other and prior contest by Hyde against the Sioux Half-Breed scrip location of Eaton had passed the office of the Register and Receiver and of the Commissioner and was *then pending before Secretary Vilas upon appeal.* In other words, upon the date when the Commissioner ordered this hearing upon Hyde's application, Hyde's entire pre-emption claim, upon which alone the application to contest was based, was pending before Secretary Vilas upon the voluminous testimony taken in the prior case and was there awaiting such disposition as that officer should make of the matter. It is apparent, therefore, that the order in the first instance was unadvisedly and improvidently issued.

February 18, 1889, within sixty days after this order of the Commissioner granting Hyde a hearing upon his application, Secretary Vilas rendered the decision to which reference has already so many times been made, declaring the pre-emption claim of Hyde to be in violation of law and cancelling all record of the same so far as it had progressed.

March 8, 1889, eighteen days after this decision of Secretary Vilas cancelling Hyde's pre-emption claim, and fifteen days after the land involved in that case had been restored to the public domain at the local land office, the Commissioner revoked his prior order, made two years and a half previous, granting Hyde a hearing against Warren. This was obviously done in execution of the decision made by Secretary Vilas. Hyde claimed nothing under his application to contest except a right founded upon his pre-emption claim; that claim had been specifically re-

jected and cancelled by Secretary Vilas, and the decision of the Secretary had been fully executed by directions to the local land office save only with respect to this pending matter by Hyde against the Warren title. To clear the records of his office and to conform to the decision of his superior the Commissioner was required to revoke, and properly did revoke, the previous order for a hearing.

July 6, 1889, Hyde filed in the General Land Office a motion to reinstate his contest, which, as would appear by the allegations of the cross-petition, has never been formally acted upon. It is claimed on behalf of the plaintiff in error that the order of revocation made by the Commissioner March 8, 1889, was "without notice" to Hyde, and that for this reason the various decisions of the Department rejecting his preference right are not conclusive upon the courts.

It is somewhat difficult, as heretofore indicated, to at all times correctly understand the position of the plaintiff in error in respect to his claim of a preference right, which, upon his part, is supposed to arise from these various proceedings. At one time it would appear to be a preference right based solely upon a contest founded upon his preemption claim; at others, as a supposed preference right arising under the act of 1880. For the purposes of the present question, we discuss the claim as by possibility arising in both ways, premising however that a mere preemption settlement and filing do not, as contended by counsel, constitute an appropriation of public land.

N. P. R.R. Co. *v.* Colburn, 164 U. S 383.

Treated as an ordinary contest, brought upon a senior right or claim and not as a contest under the act of 1880, we answer the claim of counsel by the following counter propositions:

(*a*) The revocation order of March 8, 1889, was merely a ministerial act on the part of the Commissioner, in respect to which no notice to Hyde, either before or after the fact, was necessary. It was simply a clerical execution of the decision of the Secretary, his superior officer. No notice of such action was required or indeed would have been appropriate. Hyde could not have been heard upon the question if notice had been given him. If the Commissioner had formally notified him that he was about to put the decision of the Secretary into execution, the only opposition which Hyde could have submitted would have been a suggestion that the decision of the Secretary was erroneous. The only paper which Hyde had before the Commissioner was a contest based upon his pre-emption claim. That pre-emption claim had been rejected by the Secretary. Surely Hyde could not have been heard before the Commissioner by way of asking that officer to review or to refuse to execute the decision of his superior. Hence, there was no necessity for notice to him of the action contemplated, and he could have been deprived of no possible remedy or right by not having received such notice.

(*b*) As a matter of fact, Hyde had actual notice of the decision of Secretary Vilas, under which the revocation order was made, for, within the thirty days allowed by the Rules of Practice, he filed with the Secretary a motion for review of such decision. (Sec'y Noble's decision, January 28, 1891, Appendix No. 2.) In other words, Hyde, at the date of the Commissioner's order of revocation, or within a few days thereafter, had actually pending before the Secretary of the Interior a motion for review of the latter's decision of February 18, 1889, which motion raised every question in the case before the Secretary which Hyde could possibly have raised, even in an irregular and improper manner, before the Commissioner. He was, obviously,

relying upon the validity of his pre-emption claim and he was asserting his rights thereto, in the proper place for their assertion, to wit, the office of the Secretary, and not the office of the Commissioner, his subordinate.

(*c*) Hyde had actual notice of the revocation order itself very shortly after it was made. This is shown by his motion to reinstate his contest filed July 6, 1889. This was done, however, while his motion for review of Secretary's Vilas' decision was actually pending before his successor, Secretary Noble. In other words, the entire contention of the plaintiff in error, so far as the revocation of this order for hearing is concerned, is obviously without a particle of merit. The order itself was purely ministerial; it could not, from its very nature, have deprived him of any right or remedy which he had, and, as matter of fact, did not deny him any such right or work him any injury whatsoever. Upon the contrary, he actually asserted every right and followed every remedy which he could have asserted before the Commissioner, and more also, in his proceeding before the Secretary.

(*d*) Secretary Noble's subsequent decision, made January 28, 1891, disposed of the whole matter. That decision overruled Hyde's motion for review, which motion, as before stated, presented every question which could have been presented to the Commissioner, by any possibility, in respect to the revocation order. It was in practical effect not only an affirmation of the order of the Commissioner revoking the order for hearing, but also a denial of the motion to reinstate filed by Hyde. There was thereafter no necessity for any further action by the Commissioner of the General Land Office and, as suggested by the Supreme Court of the State in its opinion (Tr., p. 44), it would be "somewhat remarkable if the Commissioner should act upon a motion to set aside an order made by the Secretary, his superior officer."

It is true that the Commissioner might, in a formal way, have denied the motion for reinstatement filed by Hyde, but had he done so, or should he now do so, it is entirely clear that Hyde would be entitled to no appeal or other remedy. It is equally clear that non-action by the Commissioner on this motion has in no way prejudiced the claim of Hyde, however the same may be now asserted.

Treated as a contest under the act of May 14, 1880, the claim of counsel for plaintiff in error in respect to this order of revocation is equally untenable. The Commissioner's letter of March 13, 1891, ordering a hearing as between the claimants who sought to make entry of the land after the cancellation of the Sioux Half-Breed location, expressly reserved to Hyde full right, in that proceeding, to assert any claim which he had, or claimed to have, under the act of 1880. He became a party to that proceeding, under such order, and throughout its entire progress was recognized as a party and given full opportunity to be heard in respect to his preference right. He appeared and submitted voluminous testimony in this regard, and his claim of preference right thus presented after full hearing was also rejected by Secretary Smith in his decision of December 21, 1894 (App. No. 4, 19 L. D., 551 to 553), and again upon review, April 12, 1895 (20 L. D. 324).

Aside from the consideration that these two last-mentioned decisions were entirely upon matters of fact and therefore conclusive, we submit that the action taken by the Secretary was without error, because:

(*a*) The pleadings themselves, as hereinbefore stated, showed that the contest as initiated and carried on was based solely and entirely upon the assertion of the preemption claim, and was not, either in form or substance, under the act of 1880.

(*b*) No attempt was made by Hyde to exercise the preference right of entry within thirty days after notice to him of the Secretary's decision of February 18, 1889, cancelling the Sioux Half-Breed scrip location. Had he been prosecuting a contest under the act of 1880, such proceeding would have been necessary in order to preserve his rights. Instead of so proceeding, he filed the motion for review of Secretary Vilas' decision, thus again asserting his preemption instead of a preference right.

(*c*) Hyde did not pay, or offer to pay, the land-office fees required by the act of 1880 before a claimant can be considered as a contestant thereunder. The statute in question is one of forfeiture and undoubtedly to be strictly construed. A contestant setting up any claim under it must, assuredly, bring himself within a strict compliance of its literal terms. If it was intended to here set up, as a part of the alleged equity of the plaintiff in error, any right under the act of 1880, the cross-petition should have formally alleged all the facts necessary to have brought Hyde within the terms of that act, including the fact that he had paid the land-office fees and had *thus* procured the cancellation of the Warren location, or had become entitled to such cancellation, or at least had acquired the right to try that question. No such averments are found in the cross-petition. The condition is absolutely mandatory, and without the averment of compliance no equity can possibly be founded upon this statute.

Still further, it affirmatively appears, as a matter of fact, within the pleadings, that the necessary fees under this statute were not paid by Hyde as a contestant. (Secy. Smith's decision of Dec. 21, 1894, App. No. 4, 19 L. D., p. 552.)

(*d*) The provisions of the second section of the act of 1880 do not embrace, within the scope of their operation,

any appropriation of the public lands except pre-emption, homestead, and timber-culture entries; the Warren location upon the premises in controversy was not within either of these enumerated classes, and the same was not, therefore, subject to contest, in any event, under said act.

We assert with absolute confidence that this statute, being one of forfeiture, is to be strictly construed; that it embraces and can be extended only to the specific cases or classes of cases enumerated therein; that a location or selection of land like that made by Warren is not within these enumerated classes, and that for these reasons the plaintiff in error cannot, under any circumstances, be admitted to any claim or pretension of claim under this statute.

At the date of the passage of this act the laws relating to the disposition of the public domain had become an established system well understood and defined. This system provided, by different laws, many and various methods in which title to the public domain might pass to individuals. By some of these laws the transfer of title was known as an *entry;* by other laws it was known as a *selection;* by still other laws it was known as a *location;* by still other statutes it was known and designated as a *grant.* Without wearying the court with unnecessary detail, or with extended reference to the statutes, and without even attempting to cover the entire field, we call attention to the fact that at the date of the act of 1880 the following, among many other laws, existed under which titles were made:

1. Private entries (so called) for cash, having origin in the very earliest statutes relating to public lands.
2. Locations with bounty land warrants, having origin in statutes at least a half a century old.
3. Locations with New Madrid certificates under act of February 17, 1825 (14 Stat. 211), and amendments.

4. Pre-emption entries under act of September 4, 1841 (5 Stat. 455), and amendments.

5. Sioux Half-Breed scrip locations under act of July 17, 1854 (10 Stat. 304).

6. Chippewa Mixed-Blood selections under treaty of September 30, 1854 (10 Stat. 1109), being the treaty under which Warren located the premises in controversy.

7. Porterfield scrip locations under act of April 11, 1860 (12 Stat. 836).

8. Homestead entries under act of May 20, 1862 (12 Stat. 392), and amendments.

9. Agricultural College scrip locations under act of July 2, 1862 (12 Stat. 503), and amendments.

10. Private land scrip locations under act of June 22, 1860 (12 Stat. 85), and amendments.

11. Townsite entries under act of July 1, 1864 (13 Stat. 343), and subsequent acts.

12. Mineral-land entries under act of July 26, 1866 (14 Stat. 251), and amendments.

13. Valentine scrip locations under act of April 5, 1872 (17 Stat. 649).

14. Coal-land entries under act of March 3, 1873 (17 Stat. 607).

15. Desert-land entries under act of March 3, 1877 (19 Stat. 377), and amendments.

16. Timber-culture entries under act of June 14, 1878 (20 Stat. 113), and amendments.

17. Timber and stone land entries under act of June 3, 1878 (20 Stat. 89), and amendments.

18. Disposal of Indian lands under various special and varying statutes.

19. Various acts granting lands to the several States for internal improvement, including the university grant, the school grant of particular sections, and the swamp-land grant, all vesting, in greater or less degree, by a location or selection.

With full knowledge of this situation, to wit, that under scores of different statutes titles to public lands had been and were being initiated and perfected under varying and

different names, as "entries," "locations," "selections," and the like, Congress passed the act in question. The language used must, of course, be construed as applied to this situation. So read, it will be observed that, in a general statute, relating to other subjects in respect to which the legislation was extremely liberal, Congress inserted a section of *forfeiture*, and, out of the mass of these subsisting methods of disposition, *selected and specifically enumerated only three of such dispositions* as falling within the purpose and intent of Congress.

A critical examination of the act, both generally and in detail, shows a clear intent not to embrace within the provisions of section two any claims not therein specifically enumerated.

The title of the statute is "An act for the *relief* of *settlers* on public lands." There is certainly nothing in this title to indicate in the mind of Congress an intent to provide for a forfeiture of any claims whatsoever. On the contrary, the language indicates an intent to *relieve* certain classes of claimants, settlers, from defective or invalid claims.

Section one of the act relates generally to entries made under three of the many acts above cited, to wit, pre-emption, homestead, and timber-culture entries (Nos. 4, 8 and 16 of our list, *supra*). As to such claims, and none other, it provides that upon relinquishment of any of the same at the particular local office by the claimants, the land should thereupon be at once subject to entry. This was an exceedingly liberal enactment in favor of the policy of encouraging disposition of the public domain. Theretofore entry could only be made upon relinquishment, filed after tedious delays in the General Land Office. Thereafter they could be instantly made. This was the first provision for the "relief" of settlers; a provision under which a claimant

who had settled upon land covered by an entry of the kind described could expeditiously perfect his claim.

Section three of the act is even more liberal in the direction of the contemplated relief. Theretofore the right of homestead claimants under the act of 1862 (No. 8, *supra*) dated only from the technical entry, and five years' residence thereafter was required before the title could be perfected. This section enlarged that right by making the title under an entry relate back to the date of an antecedent settlement with corresponding reduction of the residence required. This section, in fact, is the only legislation under which a homestead claim can date from time of actual settlement. This was the second step for the "relief" of "settlers," as announced in the title.

Between these two last above-mentioned sections is the provision of law now here in question. It is a total departure from the general intent of the law-makers, as expressed in the title and as illustrated by the other provisions of the act. Instead of being a "relief" to any "settlers" upon the public domain, it is an actual cloud upon all entries made under three of the general laws above cited by providing a means by which any entry under either of said acts can be attacked by a stranger, with possible forfeiture of the said entry in favor of the informer. It is a statute of forfeiture, pure and simple, by which a vested title to land may be divested and placed in the ownership of a common informer.

We insist with absolute confidence that a provision of this character, especially when found in a statute dedicated by its title to relief instead of oppression of claims, and in immediate contact with other provisions of an exceedingly liberal character, must be, in the literal sense of the rule, strictly construed; that it must be taken and understood in the ordinary and usual acceptation of the words and phrases

employed, and that it cannot be extended to any claim or classes of claims not specifically enumerated and described.

In United States *v.* Reese (92 U. S. 214, 219), the Supreme Court, speaking by Chief Justice Waite, thus defines the rule:

"This is a penal statute, and must be construed strictly; not so strictly, indeed, as to defeat the clear intention of Congress, but the words employed must be understood in the sense they were obviously used. (United States *v.* Wiltberger, 5. Wheat. 85.) If, taking the whole statute together, it is apparent that it was not the intention of Congress thus to limit the operation of the act, we cannot give it that effect."

In Tiffany *v.* National Bank of Missouri (18 Wall. 409, 410), the court, speaking by Mr. Justice Strong, in a case identical in principle with the present, said:

"In an action like the present, brought to recover that which is substantially a statutory penalty, the statute must receive a strict, that is, a literal construction. The defendant is not to be subjected to a penalty unless the words of the statute plainly impose it."

The language of this section is perfectly plain and unambiguous. Every word contained therein is either a word of common and ordinary acceptation or of a technical meaning equally well understood in land jurisprudence. In fact, the word "entry" is perhaps the only word in the entire section having any technical meaning. That word in its generic sense, as defined by the Supreme Court, is "an act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country by filing his claim, etc." (Chotard *v.* Pope, 12 Wheat. 586–588.) In its more particular use in the Land Department, however, it is limited to appropriations of public lands where money

is paid for the same, or where title is conditional upon the performance of certain acts, by way of consideration, as, for example, settlement, residence, improvement, and the like.

In this use it is placed in direct juxtaposition to "location," the method of acquiring title by the use of the various scrips we have mentioned (Nos. 3, 5, 7, 9, 10, 13), and also to "selection," the method of identifying the title covered by the grants to the States (No. 19), and of vindicating a segregation of land in satisfaction of a consideration paid, as in the case at bar (No. 6). And as limited by the remaining words of the section defining *what* entries were within the legislative intent, the words embrace only such entries as have been made *under the pre-emption, homestead, and timber-culture laws.*

The point here of particular importance is that in creating this remedy of statutory forfeiture, Congress, instead of embracing *all* of the dispositions of which public lands were susceptible, without embracing "locations" or "selections" at all, without even including *all* entries, picked out and selected entries under *three general laws only*, and included them by certain and specific description. This we insist was absolute *exclusion* of all entries not enumerated, and of all "locations" or "selections" whatsoever. *Expressio unius est exclusio alterius.*

Even the "entries" which may be contested under the statute in question are limited. It is not every entry which may be thus attacked. The privilege is strictly and plainly limited to entries under the pre-emption, homestead, and timber-culture laws. It must go without saying that a selection of land made under a treaty in satisfaction of a consideration paid to the Government is not an entry under either one of these three laws.

Another consideration in this immediate connection is

highly important. The statute is only made by Congress to apply to entries under acts where the completion of title depends upon compliance with conditions subsequent to the entry. The laws specified are the pre-emption, homestead, and timber-culture acts. Under each of these laws various requirements are prescribed, which must be met by the claimant prior to final consummation of his title. The obvious intent of Congress in the act of 1880 was to provide for a forfeiture of claims in cases, and such cases only, where these subsequent conditions had not been complied with. The contest privilege is expressly confined to that class and character of claims. It is not, by any possible stretch of construction, extended to cases where, at the date of the entry, all requirements of law had been fulfilled, and nothing more remained to be done save the issue of a patent.

There certainly was no intent on the part of Congress to allow a contest against an appropriation of public land, like that made by Warren in the case at bar, where no condition subsequent to selection of any kind or character was required, and where the selection itself was founded upon a valuable consideration already transferred to the Government.

We are by no means unmindful of the fact that the Department of the Interior has, in recent cases, extended the provisions of this act of 1880 to other classes of entries than those described in the statute. We are aware of the fact that the Department has even gone further, and has held that this act applies to "locations" made with the various scrip, to "selections" made under the various grants to the States, and perhaps to other cases equally beyond the plain language of the act. In respect to such decisions of the Department, we have simply to say that they are manifestly in direct violation of the statute of

Congress which we have above cited; and, as mere conclusions of law, in the construction of the acts, are not binding on this court.

Should it be claimed (as has sometimes been done in other cases) that the words "pre-emption * * * entry," as used in this act, embrace all kinds of appropriation allowed by the laws of the United States, we reply:

(1) Whatever may be the *general* meaning of the word "pre-emption," the words "pre-emption entry" have a well defined and accepted technical meaning in land jurisprudence, to wit, an entry made under the general pre-emption act of September 4, 1841 (10 Stat. 455), and subsequent acts amendatory thereof. No one having the slightest knowledge of land jurisprudence will seriously question this proposition. This being so, Congress, in the act of 1880, must be held to have used the words in question in this technical sense. This upon elementary rules of construction too well known to require citations.

(2) The use of the words "homestead" and "timber culture," immediately following the word "pre-emption" and before the common word "entry," conclusively shows that the three first-mentioned words refer to the respective acts relating to these three classes of appropriation; in other language, to the technical pre-emption, homestead, or timber-culture entry, as the case may be. Otherwise there would have been no necessity for the use of the words "homestead" and "timber culture," for all would have been included in "pre-emption."

(3) The unwarranted extension of the remedy by the Department to other than the enumerated cases has never been based upon any idea that such unenumerated cases were included in the word "pre-emption." The Department, on the contrary, has curiously found some *general intendment* of the act to justify its extensions.

This very question has been directly decided by the Supreme Court of California and by the Circuit Court of Appeals for the Eighth Circuit, in favor of our contention.

Gray *v.* Dixon, 83 Cal. 33.

Hartmann *v.* Warren, 76 Fed. R. 157, 160 to 162.

In the case of Gray *v.* Dixon (83 Cal. 33), the very question here presented directly arose and was specifically decided. The exact question was whether a contestant who had contested a *desert-land entry* and procured the cancellation thereof was entitled to a preference right of entry under section 2 of the act of 1880. In deciding this question, the Supreme Court of California, at page 38, said:

"That act, in terms, does not mention entries under the desert-land law, such as the respondent is found to have initiated his contest against, and obtained the cancellation of by the Land Department. Although we cannot perceive any reason for the omission of desert-land entries in the above enumeration, the fact of its omission makes the rule, *Expressio unius exclusio alterius est*, applicable; and we must hold that respondent acquired no 'preference right' to enter the land by successfully contesting the right of Ward to enter it under the desert-land act."

The case of Hartmann *v.* Warren (76 Fed. R. 157, *supra*) involved this very location and the identical question now under consideration. After being defeated in the Department in his contest against the Warren location, and after patent had issued to Warren, as hereinbefore recited, Hartmann filed bill in equity to charge Warren and his grantees as trustees. Demurrer to the bill was sustained by the Circuit Court and also upon appeal by the Circuit Court of Appeals, and the case was prosecuted no further. One of the questions directly involved and decided was whether the Warren location was covered by the provisions of the second

section of the act of 1880. Upon this point the Circuit Court of Appeals, by Sandborn, C. J. (pp. 160, 161, 162), said:

"But counsel for the appellant insists that if Hartman acquired no right to the land by his offer to locate it with his Porterfield warrants on March 11, 1889, he did acquire under section 2 of the act of May 14, 1880 (21 Stat. 141, c. 89, § 2), the right to be preferred in the acquisition of the title to it by virtue of his attack upon the location and entry of Warren, which he instituted on March 19, 1889. Section 2 of the act of May 14, 1880. * * *

"It is unnecessary to consider, and we do not decide in this case, whether this term in the act of 1880 is broad enough in its significance to cover an entry under acts of Congress, other than the general pre-emption act of September 4, 1841, and its amendments, which gave a preferred right to him who occupies or improves the land he seeks to enter. Conceding that its significance is broad enough for that purpose, that is, in our opinion, the extreme limit of its meaning. A long list of entries remain, to make which no preferred right can be obtained by occupation, cultivation, or improvement. There are private entries for cash; locations with bounty land warrants; locations with New Madrid certificates under the act of February 17, 1815 (3 Stat. 211), and amendments; locations with Chippewa Mixed-Blood scrip under the treaty of September 30, 1854 (10 Stat. 1109), one of which is in question in this case; locations under Porterfield warrants under the act of April 11, 1860 (12 Stat. 836), one of which appellant sought to make; locations with agricultural college scrip under the act of July 2, 1862 (12 Stat. 503), and its amendments; locations with private land scrip under the act of June 22, 1860 (12 Stat. 85), and its amendments; locations with Valentine scrip under the act of April 5, 1872 (17 Stat. 649); entries under the grants of swamp lands, of school lands, and of lands for internal improvements to the various States of the Union (Rev. St. §§ 2479–2490, 1946, 2378, 2379), and doubtless many others of like character. Here are 11 classes of entries, which have been specifically mentioned, that are marked by

the want of the characteristic that a preferred right to make them can be acquired by settlement or improvement of the land to be entered, and the entry of Warren belongs to one of these classes. The distinguishing mark of a pre-emption entry is that very characteristic. The only logical conclusion is that Congress used that term to distinguish the class of entries which have this distinctive feature from those that have it not, and that it intended to subject 3 of the 14 classes which we have enumerated—that is to say, homestead entries, pre-emption entries, and timber-culture entries—to the burdens and dangers imposed by the second section of the act of 1880, and to exclude all others from the effect of its provisions.

"It is suggested that the officers of the Land Department have reached the opposite conclusion, and have held, in effect, that by the use of this term the act of 1880 subjects every entry of the public land to the provisions of that section. After a careful perusal of the opinions of the officers of the land department, which have been cited to us, we are not satisfied that they have ever gone to that length, and, if they had, we should be compelled to decline to follow. The opinions of the officers of that department are entitled to careful consideration and may well be permitted to lead the way to the proper construction of an ambiguous statute; but where the words of an act of Congress are plain, and their meaning is clear, they must prevail. Webster *v.* Luther, 16 Sup. Ct., 963, 967; U. S. *v.* Tanner, 147 U. S. 661, 663, 13 Sup. Ct. 436; Merritt *v.* Cameron, 137 U. S. 542, 11 Sup. Ct. 174; U. S. *v.* Graham, 110 U. S. 219, 3 Sup. Ct. 582; Swift Co. *v.* U. S., 105 U. S. 691. After a deliberate consideration of all the terms of the act of 1880, in the light of the legislation for the disposition of the public lands in force when it was enacted, all doubt of its true construction has been dispelled, and we have become satisfied that the preferred right to enter land granted to the contestant by the second section of that act was granted to the successful contestant of a pre-emption, homestead, or timber-culture entry only, that the entry of Warren was neither of these, and that Hartman acquired no right to be preferred in the acquisition of this land by his contest of

the claim of Warren. In view of this conclusion, it is immaterial that there was a regulation of the Land Department under which he would have been entitled to such a preferred right, if he had succeeded. The Land Department may undoubtedly make reasonable regulations for the conduct of the business intrusted to it and the discharge of the duties imposed upon it, provided, always, that they are not inconsistent with the legislation enacted and the policies adopted by Congress. But the act of 1880, which grants a preferred right of entry to contestants of three specific classes of entries out of more than a dozen, is an implied prohibition of any such preference to the contestants of entries which belong to the classes excluded from that enactment. Any regulation of the Land Department which allows such a preference is inconsistent with this prohibition, and must be disregarded."

* * * * * * *

Counsel for plaintiff in error, upon pages 16 and 17 of their brief, cite twenty court and departmental cases as authority for the proposition that the dismissal of Hyde's contest was without notice and *ex-parte* and therefore not binding upon the court. We have critically examined all the cases so cited. Their discussion in detail would be beyond any pardonable extension of the argument. It is sufficient to say that such examination shows that, in the entire line of cases cited, there is not a single decision, either court or departmental, which goes further than to declare that the Land Department cannot arbitrarily, and in its discretion only, dispose of questions affecting the public lands *without notice to claimants interested therein.*

All of the light to be derived from these decisions reflecting in any way upon the question at bar is found summarized in two of the decisions of this court cited by our opponents.

Orchard *v.* Alexander, 157 U. S. 372–383.

Parsons *v.* Venzke, 164 U. S. 89.

In Orchard *v.* Alexander, *supra*, the court, after an exhaustive review of all the cases, sustained the power and authority of the Land Department, including the Secretary, upon appeal, to investigate, ascertain the facts, and, upon satisfactory showing of illegality, to cancel, before patent, a consummated entry of the public lands. Thereupon, proceeding to define the limitations to this doctrine, the court, by Mr. Justice Brewer (p. 383), said (the italics being our own):

"Of course, this power of reviewing and setting aside the action of the local land officers is, as was decided in Cornelius *v.* Kessel, 128 U. S. 456, not arbitrary and unlimited. It does not prevent judicial inquiry. Johnson *v.* Towsley, 13 Wall. 72. The party who makes proofs, which are accepted by the local land officers, and pays his money for the land, has acquired an interest of which he cannot be arbitrarily dispossessed. His interest is subject to State taxation. Carroll *v.* Safford, 3 How. 441; Witherspoon *v.* Duncan, 4 Wall. 210. The Government holds the legal title in trust for him, and he may not be dispossessed of his equitable rights *without due process of law. Due process in such case implies notice and a hearing.* But this does not require that the hearing must be in the courts, or forbid an inquiry and determination in the Land Department."

In Parsons *v.* Venzke, *supra*, the court had occasion to again consider the question, and speaking by Mr. Justice Brewer (p. 91), said:

"Subsequently to the issuing of the writ of error in this case, this precise question was presented to this court, Orchard *v.* Alexander, 157 U. S. 372, and the jurisdiction of the Land Department was affirmed; a jurisdiction not arbitrary or unlimited, nor to be exercised without notice to the parties interested, nor one beyond judicial review under the same conditions as other orders and rulings of the Land Department.

"In this case the entryman was brought in by due publication of notice, and the real party in interest appeared. The contest was carried through the Land Department, from the lowest to the highest officer, and there is nothing in the record which brings the case within the rules so often laid down for a judicial reversal of the decisions of that department."

It is difficult to imagine how there ever could have been a controversy upon such a question. Undoubtedly, a right initiated under the public land laws, whether consummated or not, can no more be destroyed, without due process of law, than any other right of property. The question simply is: What constitutes due process of law in any given case? And if there ever could have been any doubt upon that subject, as to proceedings in the Land Department, it is certainly settled in the above cases by the authority of this court. Claim of title to public lands is legally denied, by due process of law, when, in a proper case, notice has been given to the claimant and an opportunity has been accorded him to be heard in defense.

In view of the foregoing considerations, what becomes of the claim advanced by the plaintiff in error that the action of the Commissioner in vacating the order for a hearing was *ex-parte* and that thereby Hyde was deprived of some right in the premises? How can a proceeding be denominated *ex-parte* which was simply a ministerial act by a subordinate court executing the judgment of a superior court, in a proceeding to which the person now complaining was a party and in which he actually appeared in the superior court, asserting every right and a great deal more than he would have been entitled to present in the lower jurisdiction? And how did the fact that the party complaining was not given opportunity to be heard by the lower court operate as a denial of any right when, as matter

of fact, he was asserting all his rights before the superior tribunal? There can, of course, be but one answer to these questions, and that answer involves the necessary conclusion that there was no error whatever in the order of the Commissioner vacating the order for a hearing.

Upon the whole general question which we have here particularly discussed, we therefore respectfully submit that the decisions of the Land Department now before this court are adjudications of fact conclusive upon the court; that in any event they are adjudications of mixed law and fact, and therefore conclusive; that the pre-emption claim of Hyde was directly in issue in the proceeding before the Secretary which resulted in the cancellation of the Sioux Half-Breed scrip location; that the testimony showing the illegality of Hyde's pre-emption claim was properly before the Secretary of the Interior and that there was no error in the action of the Commissioner in his letter vacating the order for a hearing upon Hyde's application to contest the Warren location.

It follows, as a general conclusion, that the decisions of the Department of the Interior now before the court are conclusive, whether such decisions were right or wrong, and that, for these reasons alone, the decree of the court below must be affirmed.

2.

Upon the merits, departmental decision correct.

If the departmental decisions are not final and conclusive as findings of fact, and the court may now look into the merits of the case upon which the Department passed, it then appears that the testimony affirmatively showed the existence of a prohibited contract; that the decisions were

therefore correct, and that for this reason the judgment below must be affirmed.

In this connection, it should be borne in mind that Hyde is affirmatively seeking to establish an equitable defense, occupying precisely the position of a complainant in equity seeking to restrain proceedings at law, and that the burden is upon him to establish the fact that there was error in the finding of the Department.

Occupying this position, in order to maintain his equitable defence, it is absolutely essential that he should affirmatively establish the whole of his case. In other words, if such positive affirmative case has not been established, the defendants in error are entitled to an affirmance of the judgment below.

Lee *v.* Johnson, 116 U. S. 48–50.
Bohall *v.* Dilla, 114 U. S. 47-51.
Sparks *v.* Pierce, 115 U. S. 408, 413.

And the court will not review the action of the Department in a mere determination of the weight of evidence in the case or deductions from the proofs presented.

Shepley *v.* Cowan, 91 U. S. 340.
Baldwin *v.* Stark, 107 U. S. 465.
Sanford *v.* Sanford, 139 U. S. 647.
Lee *v.* Johnson, 116 U. S. 51.
Quinby *v.* Conlan, 104 U. S. 425, 426.

If there was testimony before the Secretary of the Interior tending to prove the existence of the contract in question, and that testimony so tending was not refuted or denied by other testimony, the decision of the Department will not be disturbed by this court.

Diller *v.* Hawley, 81 Fed. Rep., 651.

The last above-cited case, as we have already noticed, was

one wherein there was no direct evidence of the existence of a prohibited contract, but the Secretary had inferred the fact from circumstances surrounding the transaction; in other words, by a deduction from evidence, had found the fact that the claimant was not acting in good faith, but had made a contract under which his title would enure to another. Addressing itself to this situation and to the question whether such an action on the part of the Department was conclusive as a finding of fact, the court (p. 658) said:

"We are of opinion that the evidence upon which the Secretary of the Interior acted was sufficient to justify the inference that there was some prior understanding, although not directly shown, between Hackley, the entryman, and Lohr, acting with and for Bailey, that his acts should inure to their benefit, and that he applied to purchase the land on a speculation, and not 'in good faith to appropriate it to his own exclusive use and benefit;' and that such acts are as much in violation of the statute as if the entryman had directly made a contract in writing with a person, by which the title which he might acquire from the Government should enure to such person; and that the facts elicited upon the trial of this case in the circuit court are not of such a character as to authorize the court to enter a decree in favor of the appellees herein."

Considered in the light of these rules of the law, how stands upon its merits the decision of the Secretary adverse to Hyde? The testimony before the Secretary, as set out in the cross-petition, is published at pages 18 and 19 of the Transcript. That of the plaintiff in error, Hyde, as thus set forth, is as follows:

"Q. Did you have any contract with Mr. White in writing or otherwise by which he was to receive any compensation or interest in the land?

"A. Yes; there was a contract.

"Q. Where is it?
"A. I don't know.
"Q. When and where did you see it last?
"A. I have not seen it since it was drawn by Mr. White.
"Q. What did it contain?
"A. It contained when I proved up on the land I was to secure him on a one-half interest.
"Q. Who witnessed the contract?
"A. Powers, McDonald and myself and Mr. White were together; that is all I recollect. I can't say whether Powers witnessed it or not. The last I knew of the contract Mr. White had it. Mr. Powers was not included in the contract with McDonald and myself and White."

This testimony, beyond any possible question, shows that there was a contract in existence between Hyde and White, by which White was to receive some "compensation" or "interest" in the land; that, when last seen, this contract was in White's possession; that it was to the effect that when Hyde proved up, he was to secure White "on a one-half interest;" that this contract also included McDonald as a party. This testimony of Hyde, standing alone, might possibly have been susceptible of two constructions, one for and one against the existence of a prohibited contract. Except for the use of the expression "secure him on a one-half interest," the contract would certainly have been one prohibited by law. The peculiar expression above quoted might or might not indicate that the contract was to convey a portion of the premises by way of mortgage. That, however, was a question, under the authorities cited, for the Secretary of the Interior to decide, into which the court will not inquire.

But, whatever construction might by varying minds be placed upon this testimony of Hyde, it is entirely clear, by reference to the testimony of McDonald, that the contract was an agreement for an absolute sale and not a mortgage.

McDonald's testimony, as quoted in the cross-petition, is as follows:

"Mr. White has furnished me the supplies to keep me on the claim. I am making the improvements for myself. I don't know of any one being interested in the claim except myself. Judge White has no interest in it. There is an understanding that he is to have an interest in it if we succeed in this trial. He is to have a half interest. I know R. D. Mallett; he has no interest in the claim, he is not going to have any.

"The arrangement with Hyde is the same as mine. White is to have half if we succeed in this. James H. Powers is also to have an interest in it if we succeed. I don't know how much he is to get. I agreed to give him an interest if we succeeded in getting the land. Mr. Hyde went after Powers to come and testify in the case. I never had any talk with Mallett about the claim. Mr. White is paying the expenses of the claim, with the understanding that he is to have a half of it if we secure it."

Then follows a redirect and cross-examination, which further changes in no material respect the statement of McDonald previously made. In the redirect examination, in answer to a worse than leading question obviously intended to suggest to him the use of the word, he says the contract was "a security"; but immediately, upon further cross-examination, he reiterates the statement that White was to have an interest in the land when he, the witness, secured it "to pay him for his time and services," and furthermore admitted that the transaction could not be carried out without a conveyance of a portion of the premises. This redirect and further cross-examination will not be accepted by the court, as it was not by the Department, as showing anything more than an abortive attempt to evade the damaging effect of the first admissions of the witness.

The entire testimony of McDonald, therefore, was to the

effect that White was furnishing supplies to keep him on the land; that there was an understanding that White was "to have an interest" in the land if the witness succeeded in procuring it; that this interest was to be "a half interest"; that White was paying the expenses, with the understanding that he was "to have a half" of the land if McDonald secured it; and that Hyde's arrangement with White was the same as that of the witness.

Taking the testimony of these two witnesses together, there can be no reasonable doubt as to the character of the agreement which was made. The paper was the same; McDonald's testimony clearly made it an absolute contract for the conveyance of an undivided interest, and Hyde's testimony is consistent with that theory of the case.

The testimony of White, which could, of course, have explained the whole situation favorably to his clients, if that had been possible, instead of doing that, furnishes, by what is obviously suppressed rather than by what is said, conclusive evidence of the actual existence of the contract. White was the attorney of both of these claimants. He well knew the effect of such a contract. According to his own testimony, that contract had disappeared from his possession. He was in a peculiar situation. If he denied that the contract was one for conveyance of one-half of the fee, he was liable to be confronted by the contract itself. And if he said nothing on the subject, the inference as to the existence of a prohibited contract would be irresistible. Bearing this situation in mind, we invite the attention of the court to his testimony in full (Tr., p. 18):

"I am one of the attorneys for the contestant; I have made careful search through my safe and among all my papers for the contract of security given me by the *contestants* in these cases to secure me for advances and legal services, and I am unable to find it. I supposed until about

two or three days before the day set for hearing that it was in the files of the case in my office, but I have looked through that and could not find it and have made a careful search through my safe and among all my papers where I thought it could be, and have continued that search at various times up to this morning, when I made a last final search through my safe and have been unable to find it and have no idea where it is."

If anything further than the testimony of Hyde and McDonald were necessary to show beyond question the existence of the prohibited contract, it is found in this evasion by their counsel. His testimony was an obvious attempt to give the color of a security to the instrument without putting himself in the position of testifying to any such fact, with the possibility of being confronted with the contract itself. With the damaging testimony of both Hyde and McDonald before him, he goes no further in his own testimony than to refer to the paper incidentally, and almost parenthetically, as a "contract of security." A skilled lawyer never adopted that expression under such circumstances if, as matter of fact, the contract was not an absolute one for an undivided half of the fee.

It is claimed, however, that the testimony of Hyde was misread and misunderstood by Secretary Vilas, and that this misreading and misunderstanding of certain of the actual words used by Hyde is such an error as would remove from the decision the effect of conclusiveness. The words in question as used by Hyde, according to the cross-petition, were "*on* a one-half interest" instead of "*a* one-half interest." The words as recited in the decision simply omit the word "on" in this particular answer. It is claimed that the effect of this was to recite in the decision testimony by Hyde which indicated an absolute contract to convey one-half of the fee, whereas the actual language indicated that

the conveyance was to be by way of security or mortgage. This recitation, it is claimed, was such an error as will permit the court to treat the finding of the Secretary as inconclusive. To this proposition we answer:

First. There is nothing whatever in the case to show how this variance between the Secretary's decision as printed, and the testimony of Hyde as found in the record, occurred. It may have been a mere clerical mistake of the clerk, or stenographer who wrote out the decision. The testimony, exactly as taken and recorded, may have been correctly read and as correctly read have been given the full force which our opponents claim for it. It does not necessarily follow because the word "on" was omitted in the print of the Secretary's decision, that therefore the testimony was so read by the Secretary. One inference, from the record, is just as plausible as the other. And as Secretary Vilas left the office within thirty days after the rendition of his decision and therefore had no connection whatever with the disposition of the case afterwards, it follows that in the subsequent decision on review the real fact in this connection is not stated. Had Secretary Vilas remained in office and disposed of the motions for review, there would undoubtedly have been now no question upon this subject. In any event, this court will not assume that a mere misprint of this kind indicated, in fact, any misapprehension or misreading of the testimony as given.

Second. The decision of Secretary Vilas did not rest alone upon this testimony of Hyde. There was also the testimony of McDonald and White. In fact, it was the latter testimony which was mainly convincing upon the question. Hyde's testimony might have been omitted from the case altogether and there still would have been abundant evidence to have supported the finding. And even if it be conceded that the testimony of Hyde was actually misread

and that, as given, it bears the construction for which our opponents contend, still that would not have changed the preponderance of evidence in favor of the existence of an illegal contract; for McDonald gave the terms of that contract with precision, said that the contract on the part of Hyde was exactly the same, and White practically corroborates him by his evasive testimony.

Third. The exact contention here made was raised before and decided by Secretary Noble upon the motion for review. (App. No 2, 12 L. D., 157–160.) One of the points raised by Hyde in this motion for review, as stated by the Secretary, was "that the testimony was misquoted in said decision." This error was fully argued before Secretary Noble and is by him, in his decision, discussed at length and decided adversely to the contention of Hyde. The language of the Secretary upon this point was as follows:

"This change does not, however, destroy the effect of the testimony taken as a whole or necessarily demand a different conclusion. There is testimony to sustain the finding on this particular phase of this case and it is not shown that such finding was against the palpable preponderance of the evidence. In such cases a review will not be allowed."

It is thus seen that upon this question, as upon all others, Hyde has had his day in court.

Secretary Noble's decision, as above made, is certainly not a conclusion of law. It was simply, upon review of his predecessor's decision, a deduction from the corrected evidence, and was the result of determining the weight of testimony; precisely such a case as this court has repeatedly declared cannot be reviewed by the judicial branch of the Government.

The ultimate rejection, however, of Hyde's pre-emption

claim did not rest alone upon the testimony of himself, McDonald, and White in the original case. As we have already pointed out, after Secretary Noble's decision, another case arose between conflicting claimants, each alleging priority of application, after the cancellation of the Sioux Half-Breed location. To Hyde, under Secretary Noble's decision, was reserved the right to become a party to the new case. He actually became a party thereto and participated in the hearing and trial. At that trial "voluminous testimony" was taken upon this point and the Commissioner in his decision expressly finds that this additional testimony "clearly and conclusively" established the fact of the existence of the prohibited contract even if that fact did not satisfactorily appear in the first decision. (Commissioners decision, Appendix No. 3.)

When, therefore, Secretary Smith came to dispose of the second proceeding by his decision of December 21, 1894 (Appendix No. 4, 19 L. D. 547), he had before him additional and further testimony establishing clearly the existence of the contract. That he did not mention this fact in the decision, or the fact that the Commissioner had so determined upon such additional evidence, simply shows that in his judgment the question was *res adjudicata*, standing upon the original testimony alone, and that there was, therefore, no necessity for reviewing the mass of additional evidence which had been taken.

The position of counsel upon this point, in view of the situation as demonstrated by this second case, can hardly be explained, unless our friends assume that the omission, in the cross-petition, to make any mention whatever of this second case to which Hyde was a party cannot be supplied by the judicial notice which this court will take of the official records of the Interior Department upon this point.

In conclusion upon this point, we submit that the weight of the testimony precisely as given showed the existence of an illegal contract; that the misquotation of Hyde's testimony in the decision of Secretary Vilas was not such a mistake, even if it had followed a misreading of the testimony, as would have changed the result; that Secretary Noble, reviewing the whole question, again decided, upon the corrected testimony, that such a contract existed, and that the motion for review contained no ground for its its allowance, and, finally, that when the case was ultimately decided by Secretary Smith, there was abundant additional testimony showing conclusively the existence of the contract. We further submit that all of these questions involved decisions of the Land Department upon the weight of evidence which will not, under any circumstances, be reviewed by this court.

The contract thus shown to have been made between the parties was in direct violation of section 2262, Revised Statutes of the United States; the claim of Hyde was illegal and fraudulent, and the same was properly rejected and cancelled by the Land Department.

Myers *v.* Croft, 13 Wall. 291.
Warren *v.* Van Brunt, 19 Wall. 646, 654, 655.
Quinby *v.* Conlan, 104 U. S. 420, 422.
Anderson *v.* Carkins, 135 U. S. 483, 486 to 489.
U. S. *v.* Steenerson, 50 Fed. 504, 510.
Diller *v.* Hawley, 81 Fed. 651, 658.
Bass *v.* Buker, 6 Mont. 442, 444, 446, 447.
Marshall *v.* Cowles, (Ark.) 3 S. W. R. 188, 189.
Snow *v.* Kimmer, 52 Cal. 642.
Brewster *v.* Madden, 15 Kan. 249 to 251.
Ainsworth *v.* Miller, 20 Kan. 220, 222, 224.
Mellison *v.* Allen, 30 Kan. 382, 383, 384, 385.

St. Peter Company *v.* Bunker, 5 Minn. 192 (Gil. 153).
Bruggerman *v.* Hoerr, 7 Minn. 337 (Gil. 264).
McCue *v.* Smith, 9 Minn. 252 (Gil. 237).
Woodbury *v.* Dorman, 15 Minn. 338 (Gil. 272).

In Warren *v.* Van Brunt (*supra*) the court, by Chief Justice Waite, thus stated the law on this subject (page 654):

"But such a contract cannot be enforced to any extent. The pre-emption laws provided, at the time of this entry and purchase, that before any person should be allowed to enter lands upon a claim for pre-emption he must make oath that he had not directly or indirectly made any agreement or contract in any way or manner with any person, by which the title he might acquire by his purchase should enure in whole or in part to the benefit of any person except himself. Forfeiture of title to the land purchased and of the money paid for it, was made the penalty of false swearing in this particular. An entry could not have been made, therefore, by Van Brunt in trust for Warren; and if it could not have been made, a court of equity will not decree that it was. All contracts in violation of this important provision of the act are void and are never enforced. It has been so decided many times by the Supreme Court of Minnesota. We are satisfied with these decisions."

And to exactly the same effect are the decisions of the Land Department.

Lyon *v.* Iver, 6 L. D. 746.
Smith *v.* Custer, 8 L. D. 269.
Molinari *v.* Scholari, 15 L. D. 201.
Tagg *v.* Jensen, 16 L. D. 113.

But it is claimed by counsel that the testimony in the case, taken as a whole, shows that the contract was one for security, and that it was not, therefore, such a contract as is prohibited by section 2262 of the Revised Statutes of the United States. To this proposition we answer:

First. That the testimony does not, by any fair deduction, show that the contract made was a mere security or mortgage. That was the innuendo of the questions as put by counsel for Hyde, and in his own testimony. But, outside of the peculiar expression used by Hyde himself, there is no word in the whole of it which can fairly be said to characterize the contract as a security or mortgage, and the whole testimony taken together shows by a fair preponderance of the evidence, even considered as an original question, that the paper in question was a contract for absolute sale.

Second. The character of the instrument, whether a contract for a conveyance for a part of the fee or a contract operating merely as a security, was a conclusion to be drawn from the evidence—a deduction of an ultimate fact from probative facts established. It was, therefore, upon principle, as well as the authorities already cited, a question which will not be re-examined or reviewed in this court.

Third. That if such contract was intended to be and was in form a security or mortgage, it was still prohibited by section 2262 of the Revised Statutes and rendered the claim of Hyde illegal and invalid.

In support of their contention in this regard, counsel, upon page 27 of their brief, cite six departmental decisions and decisions of the Supreme Court in each of five States—Montana, California, Minnesota, Colorado, and Wisconsin.

Upon this question there is a conflict of authority and, so far as we have been able to discover, it has never been raised or decided in this court.

From the earliest date to the year 1882, it had been the uniform ruling of the Land Department that a mortgage of a pre-emption claim prior to final proof and payment was a contract prohibited by this section of the Revised Statutes and made illegal the pre-emption claim. April

24, 1882, however, Secretary Teller, in the case of Larson *v.* Weisbecker (1 L. D., p. 409), departed from the former construction of the Department and laid down the rule that a mortgage by a pre-emptor, made for the purpose of obtaining money with which to pay the Government price for the land, was not an alienation within the meaning of the law; and this doctrine seems to have been since adhered to by succeeding Secretaries.

The same doctrine has also been announced by the Supreme Courts of Montana, California, Colorado, and Minnesota in the cases cited in our opponents' brief. The case of Spies *v.* Newberg (71 Wis., 279), also cited in that brief, will be found, upon examination, not to cover the proposition.

The authority, however, in Montana, California, Colorado, and Minnesota has not always been as stated above. In Bass *v.* Buker (6 Mont., 442, 444, 447) the Supreme Court of the then Territory, in an elaborate opinion delivered by Back, Justice, held that a mortgage was clearly within the prohibition of the statute. This case was subsequently overruled by that of Norris *v.* Heald (29 Pac. R., 1121, 1124), the case found upon brief of counsel.

In California, in the case of Bull *v.* Shaw (48 Cal., 455, 459), the Supreme Court of that State originally held in accordance with our contention. This case was, however, as in the instance of Montana, overruled by Stewart *v.* Powers (33 Pac. R., 458, 469).

In Minnesota, two of the earlier adjudications of the Supreme Court, in well-matured opinions, held emphatically that a mortgage was in violation of the statute. (McCue *v.* Smith, 9 Minn., 252; Gil. 237; Woodbury *v.* Dorman, 15 Minn., 338; Gil. 272.) At a later date, however, the court overruled these prior decisions and held to the contrary. (Jones *v.* Tainter, 15 Minn., 423, 425.)

It is thus seen that although the latest decisions in three of the States enumerated are now to the effect that a mortgage is not prohibited, yet that in all three of such States the opposite rule very recently prevailed.

Upon the contrary, the Supreme Court of the State of Kansas, speaking by a learned member of this court, then upon the Kansas bench, has, in two well-considered cases, declared that a mortgage is within the prohibition of the act.

Brewster *v.* Madden, 15 Ka., 249, 250 to 251.
Mellison *v.* Allen, 30 Ka., 382 to 385.

In Brewster *v.* Madden (*supra*), the Supreme Court of the State, speaking by Mr. Justice Brewer, said:

"Is a mortgage given by a pre-emptor, prior to the entry of the lands, void? and if so, are his heirs estopped from setting up its invalidity in an action to foreclose the mortgage? These are the only questions presented in this case. The mortgage was on the lands entered, and on four town lots. It was given long before the entry, and to secure simply the purchase-price of the four lots. Intermediate the mortgage and the entry, the mortgagor died, and the entry was made by the widow, in the name and for the benefit of the minor heirs. Sec. 13 of the act of Congress of September 4th, 1841 (U. S. Stat. at Large, p. 456), provides that before an entry shall be allowed, the claimant shall make oath that 'he has not directly or indirectly made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself;' and it also provides that 'any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers for a valuable consideration, shall be null and void.' The question is not free from difficulty. On the one hand it may be said that, as viewed in this State, a mortgage is neither a grant nor a conveyance, and there-

fore not within the letter of the statute; that a statute like this ought not to be extended by any construction beyond its plain letter, nor held to invalidate transactions not specifically and directly forbidden; that often a pre-emptor needs assistance to complete his payment, which assistance he can only obtain by giving the land itself as the security, and that to deny him the use of the land for this purpose is against the spirit of the law. Watterson *v.* Kirkwood, 8 Kas. 465. On the other hand, it may be urged that the terms 'grant' and 'conveyance' are broad enough to include a mortgage as much so as the term 'alienation' in the constitutional and statutory homestead sections, and that it is so used in this section is evident from the terms of the affidavit required; that a mortgage is certainly an 'agreement or contract,' by which the title 'would inure in part to the benefit' of the mortgagee, and that as the pre-emptor must swear that he has made no such agreement, so the agreement when made must be held null and void. McCue *v.* Smith, 9 Minn. 252; Warren *v.* Van Brunt, 19 Wall. 646. We are inclined to favor the latter construction, and to hold that Congress intended by this section, that when the title passed by the entry to the pre-emptor, it should pass perfect and unincumbered. This act was passed in 1841. Mortgages, always in form conveyances, were then regarded by the profession generally more as conveyances, and subject to the laws and conditions of conveyances, than at present, perhaps anywhere, and certainly in Kansas; and in the light of the general understanding then, must this section be considered. It seems more reasonable that by these terms, 'grant' and 'conveyance,' was intended all forms of conveyance, whether absolute, as a warranty deed, or upon condition, as a trust deed, or mortgage."

In Mellison *v.* Allen (*supra*), the Supreme Court of said State, by Mr. Justice Brewer, said (pp. 383 *et seq.*):

* * * * * * *

"Thus it will be perceived that the law contemplates a five years' continuous occupation by the homesteader, with no alienation of interest, except for the named purposes.

It is true these sections contain no express prohibition on alienation, and no declaration of forfeiture or penalty in case of alienation; and yet the homestead right cannot be perfected, in case of alienation, without perjury to the homesteader. The statute respecting pre emption, section 2262, is more stringent and express. For that requires the pre-emptor to make oath that he has not directly or indirectly made any agreement or contract in any way or manner with any person whatsoever, by which the title he is seeking to acquire should inure in whole or in part to any person except himself; and also provides that any person swearing falsely in such oath shall forfeit the money which he may have paid for such land, and all right and title to the same; and further, that any grant or conveyance which he may have made shall, with certain exceptions, be null and void. Under this last section we held, in *Brewster* v. *Madden* (15 Kans. 249), that a mortgage made by a pre-emptor is an alienation, and void."

* * * * * * *

"We think the latter reasoning correct, and that whether the contract be absolutely void, or not, it is so clearly against the will and policy of the government, and so necessarily resting upon perjury, that a court of equity will have nothing to do with it."

The question here under consideration does not, as hereinbefore stated, appear to have been directly considered or decided by this court, but indirectly the court has given its sanction to the doctrine of the Kansas cases. In Warren *v.* Van Brunt (19 Wall. 655), which came to this court from the Supreme Court of Minnesota, one of the questions which arose was whether a contract made between two pre-emption claimants who had settled upon the same forty-acre tract, then unsurveyed, establishing a partition line between their claims, could be enforced by one of such settlers as against the other holding the Government patent by charging the patentee as the trustee. Speaking to this question and

specifically citing the decisions of the Supreme Court of that State hereinbefore referred to holding a mortgage to be prohibited, this court, by Chief Justice Waite (p. 655), said:

"An entry could not have been made, therefore, by Van Brunt in trust for Warren; and if it could not have been made, a court of equity will not decree that it was. *All contracts in violation of this important provision of the act are void and are never enforced. It has been so decided many times by the Supreme Court of Minnesota. We are satisfied with these decisions.*"

We thus have, as sustaining the proposition that a mortgage is prohibited, the former decisions of the Supreme Courts of California, Montana, and Minnesota; the continuing decisions of the Supreme Court of Kansas, and the fair inference of the judgment of this court expressed in Warren *v.* Van Brunt. Against this stand the decisions of the Secretary of the Interior, departing from the former well-established rule and the later decisions of Colorado, Montana, and Minnesota. We submit that the weight of authority is consonant with the Kansas cases and the earlier cases of the other States.

With great respect for the judicial authorities above mentioned which are against us on this proposition, we nevertheless submit that the principle upon which the question must be solved is plain and that it has been overlooked in the decisions in question. The prohibition was intended to prevent speculation in these claims; to prevent the hiring of settlers to take possession of Government lands simply that the title might eventually pass to others than themselves. To accomplish this end, words are used as plain as the English language is susceptible of producing. The statute in the first place provides that before an entry can be allowed,

the claimant must make an oath "that he has not directly or indirectly made any agreement or contract, in any way or manner, with any person whatever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself;" and in the second place, that if any person shall take such oath falsely, he shall forfeit the money which he has paid for the land and that "any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers for a valuable consideration, shall be null and void, except as provided in section twenty-two hundred and twenty-eight." Any contract which is a plain and palpable violation of this law must be prohibited by it and judicial construction should not, we submit, be allowed to defeat the intent of Congress. What easier and more convenient subterfuge could be adopted by speculators to avoid the act than an instrument in the form of a mortgage, thus evading the prohibition of the law without incurring its penalties; and yet that is precisely what may be done and undoubtedly will be done should the doctrine ever be finally and authoritatively announced that a mortgage is not within the provisions of the act. We confidently submit that no construction should be adopted which would work that result against what seems to be the plain language of the act, and we are entirely content to rest our contention in this regard upon the opinion of Judge Bach in the Montana case and upon those of Mr. Justice Brewer in the two Kansas cases above cited.

It is further in this connection to be observed that all of the cases hereinbefore referred to in which the mortgages have been held to be not within the prohibition of the act proceeded upon one special condition or fact common to all the cases, viz., that the mortgage in the particular case was

made either for the purpose of obtaining money with which to pay the Government price for the land or for the purpose of maintaining the settler thereor while performing the conditions of law. That was the express consideration which entered into the first decision of Secretary Teller upon this subject as thus stated by that officer (1 L. D., 411):

"This law was intended to prevent speculative entries; but if a pioneer settler, struggling for a home for himself and family, is compelled by his necessities temporarily to mortgage his land, that he may pay for it and secure it to himself, and his good faith is manifest, and, in the absence of all fraudulent or illegal purposes, I discover no reason why the Government can reasonably object thereto, or that it is within any prohibition of the law."

And from that date to the present time, wherever there has been a decision to this effect, it will be found that it proceeded upon that theory and was applied to that class of cases alone. Neither the Department nor any court has ever yet held that a mortgage was not prohibited by the act in a case where it appeared, upon its face or otherwise, to be a mere subterfuge for evading the law of Congress.

The case at bar is not a case where the transaction was of a *bona fide* character, even if the contract can be considered a mortgage. It is obviously a pure speculation on the part of White and the claimant to appropriate what was even then supposed to be a valuable tract of iron land. There was no advancement of money to maintain a residence of good faith thereon and no other consideration presenting any equity for consideration.

Counsel for plaintiff in error submit the proposition that by section 2262 of the Revised Statutes no forfeiture is declared on account of the *making* of a contract; that

if such a contract is not in existence at the date of final proof, the applicant can make the required affidavit and prove up his claim, and that a revocation of a contract to convey leaves the same as if no contract had been made.

We deny that this is a correct statement of the law upon this point, and upon the contrary submit that a claimant who has thus attempted to violate the statute and commit a fraud upon the Government cannot, when detected therein, or when fearing detection, thus avoid the consequences of his act.

Counsel, in support of their contention upon this point, upon pages 28 and 29 of their brief, cite six departmental and two court cases. One of said departmental cases, Ward *v.* Williams (10 L. O., 140), we are unable to find in the volume mentioned, or elsewhere. Two other of said departmental citations, Matthiessen and Ward *v.* Williams (3 L. D., 280), and the same case, 6 L. D., 95, are different phases of the same controversy, standing upon peculiar and exceptional facts, the conveyances in question having been made in absolute good faith, for small fractions of a claim, in town lots, to accommodate settlers in a mining camp which had sprung up in a night on a homestead claim, and which quite as suddenly, before final proof, disappeared and the grantees with it. The case was in no sense typical. Another of such departmental cases, referred to only by date but which we identify as Crawford *v.* Fergerson (10 L. D., 275, not 375 as stated), is an authority the other way, wherein the Secretary held that a rescission of such a contract could not be made so as to affect the right of an adverse claimant. Another of said departmental cases, California *v.* Alari (1 L. D., 407; 8 Copp L. O., 140), is a decision of the Commissioner, wherein the fact of rescission did not appear and in which the Commissioner's decision was affirmed by the Secretary (1. L. D., 454, 455) not upon any such

ground, but solely upon the ground that the tract conveyed was so small that it might be overlooked under the maxim *de minimus non curat lex.* The last and only remaining departmental case cited, Aldrich *v.* Anderson (2 L. D., 71), being in fact the only one sustaining the contention of our adversaries, was overruled in Molinari *v.* Scholari (15 L. D., 201) and Tagg *v.* Jensen (16 L. D., 113).

Upon the contrary of this contention the Secretary has repeatedly held, in decisions coming down almost to the present date, that the attempted rescission of such a contract will not relieve an entryman from the effect of his illegal act.

La Bolt *v.* Robinson, 3 L. D. 488, 490.
Etienne *v.* Martel, 6 L. D. 285.
Palmer *v.* Stillman, 18 L. D. 196.
Walker *v.* Clayton, 24 L. D. 79, 80.
Swaze *v.* Suprenant, 24 L. D. 337.
Crawford *v.* Study, 26 L. D. 708.

Larison *v.* Wilbur (N. D.), 47 N. W. R. 381, was a case where, prior to initiation of a pre-emption claim, there had been an oral agreement to convey, which, after the patent had issued, was followed by a written contract containing the same terms. Upon bill filed by the pre-emptor for a specific performance, the defense was that the contract was against law and could not be enforced. The court held against this contention on the ground that the real contract was the one made after patent and that the question of forfeiture, if any there existed, was between the patentee and the United States. There is nothing in the case touching the question of the effect of a rescission.

Simpson *v.* Applegate (Cal.), 17 Pa. Rep. 237, is the only case cited, departmental or court, which sustains the proposition of our adversaries.

In that case a contract had been made, but, prior to final proof, had been rescinded upon discovery of the fact, on the part of the claimant, that it was in violation of law. The court held the claimant entitled to make final proof, upon this condition of fact, but, in delivering its opinion, the court (at p. 238) said:

"The finding that the parties rescinded their contract in order to qualify the defendant to become a witness on the application for the patent must be taken to mean an effectual rescission. There is nothing in the record to show that they did not intend it to be such; and, if the record had shown that such was not their intention, it cannot for a moment be supposed that any court would countenance such a trick upon the officers of the Land Department, or such trifling with the obligations of an oath."

And, upon the contrary, so far as judicial authorities are concerned, the Supreme Court of Minnesota has announced the doctrine of the line of departmental cases which we have above cited and declared that a recission cannot revest the claimant with a legal status.

St. Peter Company *v.* Bunker, 5 Minn. 192 (Gil. 153).

The principle for which we are contending is illustrated in that class of cases in which this court has declared that contracts in violation of law, or against public policy, cannot be enforced, even although not specially pleaded, and that no consent or stipulation, however solemn or formal, between the parties, can neutralize the effect of the violation of law.

Coppell *v.* Hall, 7 Wall. 542, 558, 559.

Oscanyan *v.* Arms Co., 103 U. S. 261.

In Oscanyan *v.* Hall (*supra*) the court, by Mr. Justice Field (pp. 268, 269), after declaring that the court in such

a case would not be restrained by any defect in pleading, or waiver by the parties, cites, with affirmation and approval, the following language by Mr. Justice Swayne in the prior case of Coppell *v.* Hall:

"Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract and void for the same reasons. Wherever the contamination reaches it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation."

But of what importance is this consideration in the case at bar? There is no pretence that the contract between Hyde and McDonald and White and Powers has ever been cancelled. In all this litigation, running through all these years, no one of these persons has ever even asserted, still less proven, any such fact. With the exception of Powers, as shown by the record, all three of these persons have repeatedly testified in the case without even once suggesting any revocation of the contract. They have repeatedly endeavored, by inference, to give some particular construction to the instrument, but not once has any one of them denied the fact that such contract is still in existence. In view of this fact, the particular question here under consideration becomes entirely immaterial. The contract, for whatever it contained, was in existence during the period of the departmental legislation; was in existence at the commencement of the case here pending, and is undoubtedly in existence at the present time.

II.

As the Equitable Defence Was Bad on Demurrer, There Is No Further Question Here for Review.

As will appear from our statement of fact, the record in the case at bar shows no questions whatever for the consideration of this court except those predicated, in some way, upon the proposition that the equitable defence set up in the cross-petition was effective. Inasmuch as we have seen that such equitable defence was bad upon demurrer, and that the judgment of the court below must be affirmed, it necessarily follows that this conclusion disposes of the entire case.

The findings of the trial court, both original (Transcript, page 35) and amended (Transcript, pages 38 and 39), are limited to facts arising in the case entirely independent of those set up in the cross-petition. They relate to the ownership of the legal title, to the lease of a portion of the premises to the Bishop Iron Company, to the seizen of said company, to the adverse possession of Hyde and to the fact that Hyde did not claim under any patent or other instrument of conveyance from the United States. These facts are in no way questioned or submitted for review in this court.

The settled case or bill of exceptions (Transcript, page 36) shows the proceedings had at the trial under the issue made by the first subdivision of defendant's answer, to wit, his traverse or denial of the formal declaration in ejectment as contradistinguished from his equitable defense. It recites that the cause came on for trial November 30, 1896; that the mandate of the Supreme Court affirming the action of the court below upon the demurrer to the counter-claim

was on file; that the plaintiff thereupon offered in evidence the patent to Warren dated December 26, 1894; that to this offer the defendant, Hyde, objected as incompetent, immaterial, and irrelevant, and also that the same was void for the reasons set up in the cross-petition, and that said objection was overruled and that defendant excepted. The bill further recites that thereupon the plaintiff offered in evidence conveyances which upon their face conveyed the Warren title under the said patent to the Bishop Iron Company, partly in fee and partly by the lease; and that to each of said last-mentioned offers the defendant objected as incompetent, immaterial, and irrelevant, which objections were overruled and defendant excepted. The objection to the patent and the mesne conveyances on the ground of incompetency, immateriality, and irrelevancy is not relied upon by plaintiff in error in any of his assignments; and as such objection was obviously without merit, no further consideration thereof is necessary. The objection to the admission of the patent was based, as above set forth, entirely upon the ground that it was void *by reason of the facts set up in the equitable defence.* This equitable defence being insufficient, it follows that the objection upon this ground was also without merit and was properly overruled.

The assignments of error Transcript, pages 4 to 7; brief for plaintiff in error, pages 3 to 6) do not point out any other or further supposed errors in the proceedings below and brought here by the writ of error.

It follows that an affirmance by this court of the decision of the court below, on the questions presented by the demurrer, necessarily disposes of all other questions brought here by the writ of error.

III.

Judgment Below Final as to Certain Defendants in Error.

The transcript is somewhat obscure in showing, except as to the Bishop Iron Company, the exact proceedings in the State courts affecting the defendants in error.

It will be recollected that upon filing his cross-petition, Hyde, upon application to the court, under some local statute supposed to be applicable, procured an order bringing into the case certain additional parties as defendants. (Transcript, pages 11 and 12.) The transcript also shows that, on dates in some instances not given, some of the parties included in this order were either served with process or appeared, and so appearing, demurred to the cross-petition. After the return of the case to the trial court, under mandate of the Supreme Court of the State, and after judgment in favor of the Bishop Iron Company had been entered for possession and costs (Transcript, pages 39–40), to wit, March 19, 1897, another judgment against Hyde was entered in the trial court in favor of all the parties brought into the case, as before stated, as defendants to the cross-petition, to wit, Frank W. Forman, Frank B. Forman, Fred F. Huntress, Samuel C. Brown, Frank R. Webber, Henry A. Smith, Joseph A. Sharp, John P. Johnson and N. J. Miller. This judgment recites (Transcript, pages 40 and 41) that the cause had been duly heard upon the demurrers of these defendants; that the court had heard argument of counsel thereon and duly considered the same; that thereafter the court had duly made and filed an order sustaining said demurrers; that no appeal from said order had been taken, and that the time for such appeal had expired. Thereupon, upon motion of attorneys for said cross-

defendants, the judgment orders and decrees that Hyde has no right, title, estate, interest or property in the premises as against said cross-defendants, and that said Hyde is barred and estopped from having or claiming any such right, title, interest, estate or property as against said defendants. This is the final judgment of the trial court from which, so far as these parties are concerned, Hyde appealed to the Supreme Court, and also the judgment, still so far as these parties are concerned, which was affirmed by the Supreme Court and is now before this court upon the writ of error.

In view of the recitations of fact found in this judgment of the trial court, it is submitted that as to all of these defendants to the cross-petition, the judgment of the District Court was final. They were not parties defendant to the original complaint; they were only made parties to the cross-petition or equitable defense of the defendant below; they demurred to such cross-petition; these demurrers were sustained; Hyde took no appeal from the order sustaining the same, and before the final judgment upon the order sustaining these demurrers was entered, the time for appeal to the Supreme Court of the State had expired.

It is obvious that the plaintiff in error could not, by an appeal, within time, from a judgment sustaining the demurrer of the Bishop Iron Company, also carry to the Supreme Court of the State, or afterwards to this court, any question affecting these cross-defendants. The judgment against Hyde as to them must stand irrespective of the merits.

IV.

The Equitable Defence not Before this Court.

It appears from the transcript that upon the filing of the cross-petition or equitable defence (Transcript, pages

13 to 32), the Bishop Iron Company immediately demurred thereto (Transcript, page 32). This left the case with an issue at law as to the questions raised by the demurrer and with issues of fact raised by the balance of the answer traversing the formal declaration in ejectment. (General Statutes of Minnesota, 1894, Sect. 5357.) The order for trying issues of different character, thus combined, is prescribed by the practice act, viz.: first, facts to be tried by a jury; second, facts to be tried by the court; third, issues of law. (Gen. Stat. of Minn., 1894, Sect. 5263.) The trial court appears in this instance to have first disposed of the issue of law raised by the demurrer. That being done, we submit that the usual, ordinary and proper course of procedure would have been to have tried the issues of fact, to have allowed a judgment of the trial court thereafter upon all the issues and to have then appealed to the Supreme Court of the State.

We submit that when, instead of following this course, Hyde filed an appeal from the *order* of the court sustaining the demurrer of the Bishop Iron Company, and thus elected to stand thereon instead of proceeding to the trial of the issues of fact, he is bound by the ultimate decision of the appellate court upon the demurrer whenever such an ultimate decision became final and beyond remedy by way of appeal. When the Supreme Court of the State, with nothing before it but this appeal of Hyde from the order of the court below sustaining the demurrer, affirmed that order, Hyde was concluded forever thereafter, upon that question of law, unless within the time allowed, he elected to stand upon such order of the Supreme Court, accepted final judgment thereon, and therefrom prosecuted his writ of error to this court. This he did not do. The time within which such a proceeding could have been had has long since expired and he now stands in this court with no question for review founded upon his equitable defence.

Even this application did not initiate a contest against the scrip location. "To so hold would be to say that every application to enter land covered by a claim of another initiated a contest against such claim. Such a practice has never obtained—has not the sanction of any rules or regulations of the Department."

Hyde vs. Warren, 15 L. D. 418.

It thus appears from the pleadings in the contests that the only issue in the respective cases was the legality of the scrip locations. In addition to this it is alleged in answer that this was the only issue—that the pre-emption right of Hyde was not before the Secretary (Hyde did not appeal, Eaton alone appealed) and that McDonald had exhausted his pre-emption right on another parcel of land.

To recapitulate, the affidavit of contest—the affidavits of Eaton in refutation thereof—the order of hearing (record pages 25-26)—notice of hearing (record pages 26-27)—the notice of appeal from the decision of local land officer (record page 20)—the decision of the Commissioner (in which it is stated that upon "The charge of their illegality that the case is based" record page 31) all show that the pre-emption rights of Hyde and McDonald were not in issue. Secretary Vilas did not claim that the pre-emption rights of the contestants were in issue. He says: "Their (Hyde and McDonald's) appeals which were sent up with the record from the rejection of their applications appear to bring the whole matter before the Department, *and in the exercise of the power of supervision vested in the Department by law* it seems to be deemed that

upon this disclosure of the facts the proper action should be taken." He further states that a hearing had been had on their pre-emption rights. This is not true, as to Hyde at least,, and is contrary to the positive allegations of the answer. It is alleged in the answer "that prior to the decision of Secretary Vilas no charge was ever made or filed against the right of either Hyde or McDonald to file on any lands as pre-emptors, and on the question of the defendant's good faith in making said application to file on said lands as aforesaid he has never had a hearing or his day in court." (Record page 21.)

The question as to the right of the plaintiff in error to file on these lands as a pre-emptor not being in issue in the contest against the Sioux half breed scrip location and not having been brought before the Secretary by appeal, his decision thereon is mere dictum.

If Hyde's pre-emption right was not in issue as stated by Secretary Vilas himself in Thomas Madigan, 8 L. D., 188, "When the case was first before the department the only point presented by the record was the legality of the entry. There was no application for re-payment and the subject was not properly before the department. I therefore find that the ruling of the department on that question was mere dictum and not of binding force in this proceeding." "The decisions of the Land Department to have any force must be made in the due performance of official duties and in accordance with the usual and regular rules of practice or usages in the Department, *and must be based upon legal evidence*, or upon some

formal inquiry or trial at which the parties to be affected have a fair opportunity of presenting evi dence to support their claim or the rights which they assert."

Puget Mill Co. vs. Brown, 54 Fed. Rep. 991.

"The supervisory or reviewing power of the commissioner of the general land office or of the secretary is not an arbitrary, unlimited or discretionary power, but a power that must be exercised according to law and not in violation or disregard of it."

Bogan vs. Mortgage Co., 63 Fed. Rep., 192.

The Secretary of the Interior has no supervision power in case of contest for the right of pre-emptory unless an appeal as to that right is taken. Section 2273 R. S. U. S. provides "When two or more persons settle on the same tract of land the right of pre-emption shall be in him who made the first settlement, provided such person conforms to the other provisions of the law; and all questions as to the right of pre-emption arising between different settlers shall be determined by the register and receiver of the district within which the land is situated; and appeals from the decision of district officers, in cases of contest for the right of pre-emption, shall be made to the Commissioner of the General Land Office, whose decision shall be final, unless uppeal therefrom be taken to the Secretary of the Interior." This statute gives the Commissioner quasi-judicial power to pass on all contested rights of pre-emption, and where such power is given supervisory power does not exist.

Butterworth vs. U. S., 112 U. S., 50.

By the act of May 29th, 1830 (4 Stat. L., 420) the right of pre-emption was given to certain settlers on public lands. Section 3 required proof of settlement or improvement to be made to the satisfaction of the register and receiver. In Lytle vs. Arkansas, 50 U. S., 9 Howard, 314, it was held that their decision was conclusive upon the question of settlement and improvement, the court saying: "The register and receiver were constituted by the act a tribunal to determine the rights of those who claim pre-emption under it. From their decision no appeal is given. If, therefore, they acted within their powers and sanctioned by the Commissioner and within the law, and the decision cannot be impeached on the ground of fraud or unfairness, it must be considered final." Congress had the power to make the decision of the Commissioner in these matters final unless an appeal was taken, and having done so it deprived the Secretary of the supervisory power which he otherwise would have had. It cannot fairly be said that Congress intended to allow supervisory power to remain in the Secretary over these matters and at the same time say the decision of the Commissioner should be final. The two cannot exist together. Finality in the decision of the Commissioner excludes the idea of supervision on the part of the Secretary. It therefore follows that Secretary Vilas had no power or authority to pass upon the pre-emption right of Hyde, and his decision was *coram non judice.*

In Orchard vs. Alexander, 157 U. S. 372, 39 L. Ed. 737 the rule contended for by us is fully recog-

nized. In that case the question was as to the right of the Commissioner to order a hearing after a pre-emption claimant had proved up before the local land officers, and it was held he had such right—that passing on the proof was the exercise of a ministerial duty only, in a case where there was no contest the court says the approval of proof "Is as much an administrative as a judicial act. There is no contest before the Register and Receiver." Distinguishing it from a case like the one at bar where there was a contest. Again the court says: "If the section declaring that proof in respect to settlement and improvement should be made to the satisfaction of the local land officers stood alone as it formerly did it might well be contended that as the local land officers were the ones to whose determination the question of settlement and improvement was confided, and as there was no statute granting any review of their determinations, they must be taken as final. It is of course competent for congress to give finality to their determinations, and having given them power to determine and made no provision for review it naturally followed that their judgment was final." Congress has made the decision of the commissioner final in all matters relating to contested pre-emption claims unless appeal is taken, thereby segregating this class of claims "From the scope of the general system of public land law and placed it outside and beyond any supervising control of the Secretary."

The testimony relating to the contract was not in the Hyde case. Admitting that the question as to the right of the plaintiff in error to file on the land

as a pre-emptor was in issue the testimony as to the contract was taken in the McDonald case and by stipulation went into the Hyde case for the sole purpose of determining the legality of scrip location No. 19 D. It therefore could not be used for any other purpose. It would be unfair and unjust to use this testimony to determine any question other than the legality of the scrip location. When the stipulation was made Hyde had no reason to expect it would be used for any other purpose. Did he contemplate it would be he undoubtedly would not have made such a stipulation. His testimony read correctly did not show an illegal contract. and the testimony of McDonald taken in another case could not be binding upon him, admitting for the sake of argument that the McDonald testimony shows an illegal contract.

The testimony taken as a whole shows that the contract was one for security, and if so, it was not a prohibited contract under Section 2262, R. S. U. S.

Norris vs. Heald, 12 Montana, 282.
Stewart vs. Powell, 98 Cal., 514.
Wilcox vs. Johnson, 21 Col., 369.
Spies vs. Newberg, 71 Wis., 279.
Lang vs. Morrey, 40 Minn., 369.
Larson vs. Wiesbecker, 1 L. D., 409.
Young vs. Arnold, 5 L. D., 701.
Wm. H. Ray, 6 L. D., 340.
Midget vs. Ry. Co., 8 L. D., 243.
Alonzo W. Graves, 11 L. D., 283.
Murdock vs. Furgerson, 13 L. D., 198.

Whatever the form of the contract was, if intended as security it would amount to a mortgage.

Meighen vs. King, 31 Minn., 115.

Jones vs. Blake, 33 Minn., 363.

And where there is any doubt as to what the transaction is, the court will construe it as a mortgage.

Rockwell vs. Humphrey, 57 Wis., 410, and cases cited.

In order to decide as he did Secretary Vilas considered it necessary that the testimony should show *conclusively* that the contestants had made a contract which *absolutely* prevented them from ever obtaining land under the pre-emption law. Now it is clear that the testimony does not show this. The testimony is perfectly consistent with an agreement to give a mortgage on one-half of the land, and on a hearing if said agreement was produced it is plain that they would not be absolutely prevented from taking the oath required by section 2262 R. S. U. S.

Section 2262 R. S. U. S. only provides for a forfeiture in case the pre-emptor swears falsely. There is no forfeiture on account of the making of a contract, and if such a contract is not in existence when he comes to make proof he can make the proper affidavit and prove up.

In 1883 Secretary Teller held that a contract for the future conveyance of a homestead is void and will not affect the legal status of the claimant, that only an absolute conveyance will defeat his rights.

Aldrich vs. Anderson, 2 L. D. 71.

In July, 1884, he made a similar ruling.

Mathiason and Ward vs. Williams, 3 L. D. 282.

In 1887 it was held by Secretary Lamar that a

contract to convey a part of a homestead did not invalidate an entry.

Mathiason and Ward vs. Williams, 6 L. D. 95.

In the latter case there was a conveyance of a part of the land of record, but there had been a revocation of the contract. Aldrich vs. Anderson, 2 L. D. 71 is approved of and the Secretary says "I have given this matter full and careful consideration, and independent of the weight which should be given to prior decisions in the case, I am satisfied that my decision should not be disturbed. This case was approved of March 7th, 1890, 10 L. D. 375.

A revocation of a contract to convey leaves the matter the same as if no contract had been made.

Simpson vs. Applegate, 17 Pac. 237.
Cal. vs. Allen 8 Land Owner, 140.
Ward vs. Williams, 10 Land Owner, 526.
47 N. W. 382.
Anderson vs. Aldrich, 2 L. D. 71.

Such being the construction given this statute by the Department in reference to contracts to convey, it became a rule of property and Secretary Vilas had no right to apply a different rule to a case initiated prior to his decision.

Germania Iron Co. vs. James, 89 Fed. Rep. 811.

Secretary Noble should have granted the motion to reconsider the decision of Secretary Vilas. "Motions for review or reconsideration of the decisions of the Secretary will be allowed in accordance with legal principles applicable to motions for new trials

at law after due notice to opposing parties." Rules of Practice, Rule 76.

Misconduct antecedent to the weighing of testimony which affects the weight to be given to it is ground for a new trial.

Kruidenier vs. Shields, 30 N. W. R., 681.

Where it clearly appears that a witness has made a mistake in giving his testimony which is material to the issue and which probably affected the verdict, a new trial will be granted.

16 Am. & Eng. Ency. of Law, 551, and cases cited.

Where transcript of a record is introduced on a trial and it is subsequently discovered to be erroneous, it is ground for a new trial.

Farnham vs. Jones, 32 Minn., 7; 19 N. W. R., 83.

Thomas vs. Hutchinson, 25 Ark., 558.

Reenell vs. Reed, 32 Minn., 45; 19 N. W. R., 286.

The Secretary refused to grant a re-hearing on the ground that there was *some* evidence to sustain the finding of Secretary Vilas and that it was not shown that such finding was against the palpable preponderance of evidence. In other words, he adopted the rule applicable to motions for a new trial in court, on the ground that the verdict is contrary to the evidence. Under the authorities above cited this was clearly erroneous. The adoption of such a rule prevented the plaintiff in error from having a hearing on the evidence as it in fact was. Secretary Vilas made a mistake in reference to the testimony of the plaintiff

in error so as to make it appear that he testified directly opposite to what he did and on the evidence so mistaken made his decision. His testimony correctly read did not show a prohibited contract. An original decision on the evidence correctly read has never been made. Instead of the Secretary adopting the rule he did, he should have considered the whole evidence with the burden of proof upon those who attacked the defendant's good faith. Had he done so, equity and justice to Hyde required that he be given an opportunity to meet the charge of bad faith, and that he should not be bound by a conclusion drawn from McDonald's testimony and his own perverted in another case. To thus deprive the plaintiff in error of his rights was a violation of the plainest principles of equity. Such a course of procedure in a court of justice would be without justification. To hold that a party should not on a motion for a new trial be relieved from a finding of the court made on false testimony, false because mistaken, on the ground that there was *some* evidence to sustain the finding would be to ignore all other evidence than that which tended to sustain the finding. It would operate to deprive a party of his rights by mistake. Such a rule has no sanction in reason, law or equity.

The State Supreme Court proceeded on a mistaken view of the facts and an erroneous idea of the law. It says, in speaking of the order of hearing in the contest between Hyde and Warren "February 18th, 1889, the Secretary of the Interior revoked the same." It is alleged, as heretofore stated, that this was done by the Commissioner of the General Land Office.

The Court then say: "It would be somewhat remarkable if the Commissioner should act upon a motion to set aside an order made by the Secretary, his superior officer." The irrelevancy of this remark is apparent in view of the mis-statement of fact made by the Court, and even had the Court correctly stated the fact the remark is not justified for the Secretary is not the Commissioner's "Superior Officer" when contested pre-emption rights are involved unless an appeal is taken. The StateCourt also erroneously assumed that Hyde and McDonald were joint contestants of both S. H. B. scrip locations. It says: "It appears that these contests were initiated and prosecuted by McDonald and defendant (Hyde) jointly, and the testimony was in this case actually taken without objection either as bearing upon an issue which the parties last named had volunteered to litigate or as properly being within the issues—always tried without pleadings in land contests and in proceedings much more informal than in a court of justice—and thus competent and material in all respects. If the defendant desired to exclude this particular testimony he should have so stipulated. The evidence was in both cases without objection or reservation. He thus waived the irregularity if any there was. The testimony was before the land officers for all legitimate purposes. They determined the question of fact presented and there is no reason why we should disturb the finding." (Record, page 48.) This statement will hardly bear analysis. If contests "Are always tried without pleadings" it is hardly proper to speak of an issue "As properly being within the

issues." If Hyde and McDonald jointly contested both scrip locations there would not be two cases, and the statement that "The evidence was in both cases without objection or reservation" shows that the Court reasoned part of the time as if there was only one joint contest, and part of the time as if there were two separate cases. And again if they were joint contestants and that fact would make the testimony competent in the Hyde case, why was a stipulation made or necessary? Without the stipulation it is clear that the testimony would not be in the Hyde case, and the statement that "if the defendant desired to exclude this particular testimony he should have so stipulated" assumes that it was in his case without stipulation. It is difficult to conceive just what the Court had in mind or how it reasoned this testimony into the Hyde case so as to make it necessary for Hyde to stipulate it out. It is evident that the Court was laboring under a mis-conception of the facts.

The facts are as alleged, there were two independent contests, one by Hyde and the other by McDonald. That without a stipulation no testimony was in the Hyde case, and by virtue of a stipulation the testimony taken in the McDonald case went into that case for the sole purpose of determining the *legality* of scrip location No. 19 D, and this was all the "legitimate purposes" for which it could be used. This decision, therefore, is unsound, as being based upon a mistaken view of the facts and of the law. Admitting that Hyde and McDonald were joint contestants against the separate scrip locations, there

would be two cases and the testimony taken in what is called the McDonald case would not be in what is called the Hyde case without the stipulation. The whole question therefore turns on whether or not this testimony being stipulated into the Hyde case for the sole purpose of determining the legality of the scrip location in that case could be used for any other purpose. We contend that it could not, and to use it for any other purpose was going beyond the scope and intent of the stipulation. It was limited to that purpose and that only, and could not properly be used for any other purpose. Hence the question is not whether the Secretary made a proper finding on this evidence, but whether he had any right or authority to consider it at all in determining the Hyde case.

It is indeed a strange result if Mr. Hyde can be deprived of a valuable property right in the forty acre tract in question in a contest proceeding initiated by him against the location of the S. H. B. to other lands in the same quarter section, when as stated in the counter claim no charge had been made against his qualifications to enter the land his possession. occupation and improvements of the same. When no evidence was given upon that subject save that stipulated in to "be considered in determining the validity of the location of scrip 19 D." (Record 20.)

The meaning of this stipulation is clear and unequivocal and the language of the Supreme Court of Minnesota about the testimony coming in without objection for all purposes (Record 46) is as inaccurate as the further statement on page 48 that the contests of McDonald and the defendant were initiated and

prosecuted jointly when it appears that they related to different lands (Record 16 and 17), and so far as appears there was nothing in common except perhaps that both contests were against location of S. H. B. scrip by one Eaton. There is nothing in the case warranting an extension of this stipulation beyond what it imports upon its face, i e, that the evidence was to be considered in determining the validity of the scrip location.

Secretary Vilas seems to have been misled into believing that such appeal was then before him (Record 21). Manifestly a decision made under such a mistake should not be deemed conclusive against the allegations of the equitable counterclaim all of which stand admitted in the reply. (Record 34.)

Furthermore, it appears that on motion for review, Secretary Noble modified the decision of Secretary Vilas to the extent that the same should not determine the preference right of Mr. Hyde, yet at every step both before and after such modification the ruling of Secretary Vilas is placed as a barrier before him—he is denied the right to contest the Warren entry (Record 16 and 22). Notwithstanding the commissioner's order for a hearing thereon and his motion to set aside the revocation is silently neglected (Record 22). He is ruled out of the Hartman contest and denied all right to participate therein or claim said lands—Why? By reason of any new evidence or because he had not properly occupied and improved the land? Not at all; on the contrary this action of ejectment admits he is in possession and no question is made of his residence or im-

provements, but the decision of Secretary Vilas, notwithstanding its modification, like Banquo's ghost, will not down. A decision made by mistake of what was before him upon evidence not there for any such purpose in a contest upon other land.

The counterclaim herein is the same as a bill of complaint in equity and all the allegations stand confessed including those on page 21 as to the mistake of Secretary Vilas in believing that the appeals of Hyde and McDonald were before him while no such issue was then pending; that there was a mistake in the testimony, and by reason of such mistake the Secretary erroneously and contrary to law decided that Mr. Hyde could not make the affidavit, and therefore found against him.

Is this not such a mistake as clearly comes within the power of a court of equity to give relief? Suppose there had crept by mistake into this case an affidavit taken in another contest, between other parties bearing the same names, and it was alleged in the bill that such evidence was considered by the Secretary and by reason thereof he erroneously and contrary to law decided that the party had forfeited his rights, would it not be strictly within the province of a court of equity to correct the error? Certainly the authorities so lay down the rule.

Johnson vs. Towsley, 13 Wall, 72.
Moore vs. Robbins, 96 U. S., 530.
Roy vs. Railway Co., 173 U. S., 587.

In Lee vs. Johnson, 116 U. S., 48, the court says: "that in contested matters before the land departments as in those before the courts, the de-

cision should be confined to the questions raised by the allegations of the respective parties."

Yet it is here sought to deprive the plaintiff in in error of his property by a decision made upon the appeal of the other party involving the legality of his location of S. H. B. scrip, where the plaintiff in error's claim was not in issue, when his appeal was not heard by or pending before the secretary, upon evidence to be considered for another purpose, and incorrectly set out. Surely if there is no remedy it is a consummation not to be wished but greatly to be deplored.

This court has repeadly held that where injustice has been done a court of equity will inquire into the *facts* as well as the law notwithstanding the decision of the Land Department.

Cunningham vs. Ashley, 14 How. U. S. 377.
Linsley vs. Hawes, 67 U. S. 267.
Barnard vs. Ashley, 18 How. 40.
Lytle vs. Arkansas, 22 How. 192.
State of Minn. vs. Batchelder, 1 Wallace 115
Shepley vs. Cowen, 1 Otto, 330; 91 U. S. 424.
Moore vs. Robins, 96 U. S. 535.
Railway vs. Smith, 76 U. S. 95.
Stewart vs. McHenry, 159 U. S. 643.

In State vs. Batchelder supra the Court says: "These questions have been so often before the court, and so fully considered in the last case of Lindsley vs. Hawes, where the authorities are collected, that it would be a waste of time to examine them. A court of equity will look into the proceedings before a Register or Receiver, and even into those of the land office or other offices where the right of property of a

party is involved, and correct errors of law or of *fact* to his prejudice." Mr. Justice Miller in Johnson vs. Towsley, 80 U. S. 72 says: "And so, if for any other reason recognized by courts of equity, as a ground of interference in such cases, the legal title has passed from the United States to one party, when, in equity and good conscience, and by the laws which congress has made on the subject, it ought to go to another, 'a court of equity will,' in the language of this court in the case of Stark vs. Starrs, just cited, convert him into a trustee of the true owner and compel him to convey the legal title." In Rector vs. Gibbon, 111 U. S. 276 the Court says: "That the action of the land office in issuing a patent for any of the public lands, subject to sale by pre-emption or otherwise, is conclusive of the *legal title*, must be admitted under the principle above stated; and in all courts, and in all forms of judicial proceedings, where this title must control, either by reason of the limited powers of the court, or the essential character of the proceedings, no inquiry can be permitted into the circumstances under which it was obtained. On the other hand, there has always existed in *courts of equity* the power in certain classes of cases to inquire into and correct *mistakes, injustice and wrong*, in both judicial and executive action, however solemn the form which the result of that action may assume, when it invades private rights; and by virtue of this power the final judgments of courts of law have been annulled or modified, and patents and other important instruments issuing from the crown, or other executive branch of the government, have been corrected or declared void, or other

relief granted. No reason is perceived why the action of the land office should constitute an exception to this principle. In dealing with the public domain under the system of laws enacted by congress for their management and sale, that tribunal decides upon private rights of great value, and very often, from the nature of its functions, this is by a proceeding essentially ex parte, and peculiarly liable to the influence of frauds, false swearing and mistakes. These are among the most ancient and well established grounds of the special jurisdiction of courts of equity just referred to, and the necessity and value of that jurisdiction are nowhere better exemplified than in its application to cases arising in the land office."

The application of the plaintiff in error to enter the land in controversy, although it embraced other lands not subject to entry, was sufficient. The forty in controversy, at the time the application was made, was subject to entry, and the validity of his application was not affected by the fact that the other three forties included in it were not subject to entry.

Cornelius vs. Kassel, 128 U. S., 456.
Sender vs. Kemp, 83 Mo., 588.

In the former of these cases Davidson entered forty acres of land with another tract. It was afterwards discovered that such other tract was not subject to entry, and the commissioner of the general land office cancelled the entry of Davidson for the two tracts of land on the alleged ground that one of them was included in a prior grant to the state, and therefore was not subject to entry. The court held that such action was erroneous, and says: "The forty acres in controversy

were subject to entry when Davidson entered them together with another tract. The validity of the entry of those acres was not affected by the fact that the second tract belonged to the state of Wisconsin under the Swamp Land Grant, and was not therefore subject to the disposal of the United States." See Sanderson vs. Taylor, 14 L. D., 489; Denaha vs. Holdman, 11 L. D., 409; John W. Webber 12 L. D. 563; Wilson vs. Davis, 5 L. D., 376; State vs. Dorr, 2 L. D., 637; Angus McDonald vs. Emil Hartman et al, — L. D , — (Decided Dec. 21, '94). In the latter case the aplication of Alden, although it embraced a tract which was not contiguous to the land he desired to enter, was held sufficient.

In Hendrick vs Beeler, 19 S. W. R. 492, it was held that when "One attempts to enter a particular tract of land, then vacant and subject to entry, and, with the intention of doing so, pays his money or delivers a warrant to the proper government officers he acquires an equity in the land, though the written application, required to be made by mistake and error in writing it, should mis-describe the land and wholly omit the tract intended; and that this equity may be fully enforced againt one who afterwards with knowledge of the facts which establish the equity, obtains the legal title from the United States to the same land." In the case at bar the plaintiff in error, as appears from the answer, informed the land officers that he intended to enter the forty in question even though he were not successful in his contest against the other three forties, and April 10th, 1886, when he contested the Chippewa Scrip selection made an

election if any was necessary. There is no question as to the land intended to be entered, nor that the defendant in error took with notice of Hyde's claim.

We submit that the plaintiff in error in equity and good conscience is entitled to the land in controversy. He has done everything that was within his power to do, and is entitled to the land unless it be for this alleged illegal contract. His testimony if to be considered shows that he made a contract which was not prohibited. It is alleged in the answer and admitted that he made the application to enter the land in good faith, and that with the law properly administered, patent would have issued to him. By mistaking his testimony and making it to read directly contrary to what it in fact was and by the assumption of jurisdiction and authority on the part of Secretary Vilas, which he did not possess, he has been deprived of this land. If these decisions are to be sanctioned, there is no right of property, however sacred, that is secure, and there will be no assurance that a man, let him act never so honestly, in his attempt to acquire public land, can obtain the same. The history of the land department does not furnish another instance of such a flagrant violation of the rights of an individual. The question in controversy in this case is not so much the value of the property herein involved as it is the principle. It rests with this court to say whether or not an individual who himself has done nothing wrong can be arbitrarily deprived of his rights, by the land department, and have no redress in the courts. That a mistake has been made is admitted; that an injustice and wrong

has been done to the plaintiff in error is apparent; that, in equity and good conscience, he is entitled to the land cannot be denied. We, therefore submit that the decision of the state supreme court should be reversed.

Respectfully submitted,

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